

PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2011

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

H.R. 1433

APRIL 12, 2011

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PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2011

TUESDAY, APRIL 12, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 4:10 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Chabot, King, Conyers, and Nadler.

Staff Present: (Majority) Zachary Somers, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Subcommittee Chief of Staff; and Veronica Eligan, Minority Professional Staff Member.

Mr. FRANKS. The Subcommittee will come to order. We want to welcome everyone to the Subcommittee on the Constitution, and particularly the witnesses we have here with us today. I'm going to recognize myself for 5 minutes for an opening statement.

I have called this hearing to examine the continuing need for Federal legislation to blunt the negative impact of the Supreme Court's decision in *Kelo v. City of New London*. That decision permits the use of eminent domain to take property from homeowners and small businesses and transfer it to others for private economic development. In Justice O'Connor's words, the *Kelo* decision pronounced that, quote, "Under the banner of economic development, all private property is now vulnerable to be taken and transferred to another private owner so long as it might be upgraded. Nothing is to prevent a State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping center, or any farm with a factory."

The *Kelo* decision was resoundingly criticized from across all quarters. The House voted to express grave disapproval of the decision and overwhelmingly passed the private Property Rights Protection Act with 376 Members voting in favor and only 38 Members voting against. Unfortunately, the bill wasn't taken up in the Senate.

The Private Property Rights Protection Act prohibits States and localities that receive Federal economic development funds from using eminent domain to take private property for economic development purposes. States and localities that use eminent domain for private economic development are ineligible under the bill to receive Federal economic development funds for 2 fiscal years. I be-

lieve those protections are as needed today as when they passed the House 6 years ago.

Every day, cities and States in search of more lucrative tax bases take property from homeowners, small businesses, churches and farmers to give it to large corporations for private development or redevelopment.

Let me just give you a few examples. In National City California, a local community center for at-risk youth is currently threatened with condemnation to make way for luxury condominiums. In Brooklyn, New York, 330 residents, 33 businesses and a homeless shelter were threatened with condemnation because a private developer wanted to build a basketball arena and 16 office towers. In Rosa Parks' old community in Montgomery, Alabama, minority homeowners are being forced out of their homes for economic development purposes.

Now, in none of these cases were the homes and buildings blighted or causing harm to the surrounding community. And countless more examples of eminent domain abuse exist today. Unfortunately but predictably, it is usually the most vulnerable who suffer from economic development takings.

As Justice Thomas observed in his dissenting opinion in *Kelo*, "Extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. The deferential standard this Court has adopted for the public use clause encourages those citizens with disproportionate influence and power in the political process, including large corporations and development firms, to victimize the weak."

Now, I am encouraged that last week Mr. Sensenbrenner and Ms. Waters reintroduced the Private Property Rights Protection Act, which in my judgment will help end the eminent domain abuse ushered in by this *Kelo* decision. We must restore the property rights protections that were erased from the Constitution by the *Kelo* decision. Fortunately, they are not permanently erased. Let us hope.

John Adams wrote over 200 years ago that, "Property must be secured or liberty cannot exist." As long as the specter of condemnation hangs over all property, arbitrary condemnation hanging over all property, our liberty is threatened.

I look forward to the witnesses' testimony and recognize the Ranking Member, Mr. Nadler, for 5 minutes for his opening statement.

[The bill, H.R. 1433, follows:]

112TH CONGRESS
1ST SESSION

H. R. 1433

To protect private property rights.

IN THE HOUSE OF REPRESENTATIVES

APRIL 7, 2011

Mr. SENSENBRENNER (for himself, Ms. WATERS, Mr. JONES, Mrs. BONO MACK, Mr. DUNCAN of Tennessee, Mr. GRIMM, Mr. WESTMORELAND, Mr. SIMPSON, Mr. SMITH of Texas, Mr. BROWN of Georgia, Mr. THOMPSON of Pennsylvania, Mr. ROSS of Florida, Mr. GOWDY, Mr. GRIFFIN of Arkansas, Mr. FRANKS of Arizona, Mr. COBLE, Mr. GOODLATTE, and Mr. LONG) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To protect private property rights.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Private Property
5 Rights Protection Act of 2011”.

6 **SEC. 2. PROHIBITION ON EMINENT DOMAIN ABUSE BY** 7 **STATES.**

8 (a) IN GENERAL.—No State or political subdivision
9 of a State shall exercise its power of eminent domain, or

1 allow the exercise of such power by any person or entity
2 to which such power has been delegated, over property to
3 be used for economic development or over property that
4 is used for economic development within 7 years after that
5 exercise, if that State or political subdivision receives Fed-
6 eral economic development funds during any fiscal year
7 in which the property is so used or intended to be used.

8 (b) INELIGIBILITY FOR FEDERAL FUNDS.—A viola-
9 tion of subsection (a) by a State or political subdivision
10 shall render such State or political subdivision ineligible
11 for any Federal economic development funds for a period
12 of 2 fiscal years following a final judgment on the merits
13 by a court of competent jurisdiction that such subsection
14 has been violated, and any Federal agency charged with
15 distributing those funds shall withhold them for such 2-
16 year period, and any such funds distributed to such State
17 or political subdivision shall be returned or reimbursed by
18 such State or political subdivision to the appropriate Fed-
19 eral agency or authority of the Federal Government, or
20 component thereof.

21 (c) OPPORTUNITY TO CURE VIOLATION.—A State or
22 political subdivision shall not be ineligible for any Federal
23 economic development funds under subsection (b) if such
24 State or political subdivision returns all real property the
25 taking of which was found by a court of competent juris-

1 diction to have constituted a violation of subsection (a)
2 and replaces any other property destroyed and repairs any
3 other property damaged as a result of such violation.

4 **SEC. 3. PROHIBITION ON EMINENT DOMAIN ABUSE BY THE**
5 **FEDERAL GOVERNMENT.**

6 The Federal Government or any authority of the Fed-
7 eral Government shall not exercise its power of eminent
8 domain to be used for economic development.

9 **SEC. 4. PRIVATE RIGHT OF ACTION.**

10 (a) CAUSE OF ACTION.—Any (1) owner of private
11 property whose property is subject to eminent domain who
12 suffers injury as a result of a violation of any provision
13 of this Act with respect to that property, or (2) any tenant
14 of property that is subject to eminent domain who suffers
15 injury as a result of a violation of any provision of this
16 Act with respect to that property, may bring an action
17 to enforce any provision of this Act in the appropriate
18 Federal or State court. A State shall not be immune under
19 the 11th Amendment to the Constitution of the United
20 States from any such action in a Federal or State court
21 of competent jurisdiction. In such action, the defendant
22 has the burden to show by clear and convincing evidence
23 that the taking is not for economic development. Any such
24 property owner or tenant may also seek an appropriate

1 relief through a preliminary injunction or a temporary re-
2 straining order.

3 (b) LIMITATION ON BRINGING ACTION.—An action
4 brought by a property owner or tenant under this Act may
5 be brought if the property is used for economic develop-
6 ment following the conclusion of any condemnation pro-
7 ceedings condemning the property of such property owner
8 or tenant, but shall not be brought later than seven years
9 following the conclusion of any such proceedings.

10 (c) ATTORNEYS' FEE AND OTHER COSTS.—In any
11 action or proceeding under this Act, the court shall allow
12 a prevailing plaintiff a reasonable attorneys' fee as part
13 of the costs, and include expert fees as part of the attor-
14 neys' fee.

15 **SEC. 5. REPORTING OF VIOLATIONS TO ATTORNEY GEN-**
16 **ERAL.**

17 (a) SUBMISSION OF REPORT TO ATTORNEY GEN-
18 ERAL.—Any (1) owner of private property whose property
19 is subject to eminent domain who suffers injury as a result
20 of a violation of any provision of this Act with respect to
21 that property, or (2) any tenant of property that is subject
22 to eminent domain who suffers injury as a result of a vio-
23 lation of any provision of this Act with respect to that
24 property, may report a violation by the Federal Govern-

1 ment, any authority of the Federal Government, State, or
2 political subdivision of a State to the Attorney General.

3 (b) INVESTIGATION BY ATTORNEY GENERAL.—Upon
4 receiving a report of an alleged violation, the Attorney
5 General shall conduct an investigation to determine wheth-
6 er a violation exists.

7 (c) NOTIFICATION OF VIOLATION.—If the Attorney
8 General concludes that a violation does exist, then the At-
9 torney General shall notify the Federal Government, au-
10 thority of the Federal Government, State, or political sub-
11 division of a State that the Attorney General has deter-
12 mined that it is in violation of the Act. The notification
13 shall further provide that the Federal Government, State,
14 or political subdivision of a State has 90 days from the
15 date of the notification to demonstrate to the Attorney
16 General either that (1) it is not in violation of the Act
17 or (2) that it has cured its violation by returning all real
18 property the taking of which the Attorney General finds
19 to have constituted a violation of the Act and replacing
20 any other property destroyed and repairing any other
21 property damaged as a result of such violation.

22 (d) ATTORNEY GENERAL'S BRINGING OF ACTION TO
23 ENFORCE ACT.—If, at the end of the 90-day period de-
24 scribed in subsection (c), the Attorney General determines
25 that the Federal Government, authority of the Federal

1 Government, State, or political subdivision of a State is
2 still violating the Act or has not cured its violation as de-
3 scribed in subsection (c), then the Attorney General will
4 bring an action to enforce the Act unless the property
5 owner or tenant who reported the violation has already
6 brought an action to enforce the Act. In such a case, the
7 Attorney General shall intervene if it determines that
8 intervention is necessary in order to enforce the Act. The
9 Attorney General may file its lawsuit to enforce the Act
10 in the appropriate Federal or State court. A State shall
11 not be immune under the 11th Amendment to the Con-
12 stitution of the United States from any such action in a
13 Federal or State court of competent jurisdiction. In such
14 action, the defendant has the burden to show by clear and
15 convincing evidence that the taking is not for economic
16 development. The Attorney General may seek any appro-
17 priate relief through a preliminary injunction or a tem-
18 porary restraining order.

19 (c) LIMITATION ON BRINGING ACTION.—An action
20 brought by the Attorney General under this Act may be
21 brought if the property is used for economic development
22 following the conclusion of any condemnation proceedings
23 condemning the property of an owner or tenant who re-
24 ports a violation of the Act to the Attorney General, but

1 shall not be brought later than seven years following the
2 conclusion of any such proceedings.

3 (f) ATTORNEYS' FEE AND OTHER COSTS.—In any
4 action or proceeding under this Act brought by the Attor-
5 ney General, the court shall, if the Attorney General is
6 a prevailing plaintiff, award the Attorney General a rea-
7 sonable attorneys' fee as part of the costs, and include
8 expert fees as part of the attorneys' fee.

9 **SEC. 6. NOTIFICATION BY ATTORNEY GENERAL.**

10 (a) NOTIFICATION TO STATES AND POLITICAL SUB-
11 DIVISIONS.—

12 (1) Not later than 30 days after the enactment
13 of this Act, the Attorney General shall provide to the
14 chief executive officer of each State the text of this
15 Act and a description of the rights of property own-
16 ers and tenants under this Act.

17 (2) Not later than 120 days after the enact-
18 ment of this Act, the Attorney General shall compile
19 a list of the Federal laws under which Federal eco-
20 nomic development funds are distributed. The Attor-
21 ney General shall compile annual revisions of such
22 list as necessary. Such list and any successive revi-
23 sions of such list shall be communicated by the At-
24 torney General to the chief executive officer of each
25 State and also made available on the Internet

1 website maintained by the United States Depart-
2 ment of Justice for use by the public and by the au-
3 thorities in each State and political subdivisions of
4 each State empowered to take private property and
5 convert it to public use subject to just compensation
6 for the taking.

7 (b) NOTIFICATION TO PROPERTY OWNERS AND TEN-
8 ANTS.—Not later than 30 days after the enactment of this
9 Act, the Attorney General shall publish in the Federal
10 Register and make available on the Internet website main-
11 tained by the United States Department of Justice a no-
12 tice containing the text of this Act and a description of
13 the rights of property owners and tenants under this Act.

14 **SEC. 7. REPORTS.**

15 (a) BY ATTORNEY GENERAL.—Not later than 1 year
16 after the date of enactment of this Act, and every subse-
17 quent year thereafter, the Attorney General shall transmit
18 a report identifying States or political subdivisions that
19 have used eminent domain in violation of this Act to the
20 Chairman and Ranking Member of the Committee on the
21 Judiciary of the House of Representatives and to the
22 Chairman and Ranking Member of the Committee on the
23 Judiciary of the Senate. The report shall—

1 (1) identify all private rights of action brought
2 as a result of a State's or political subdivision's vio-
3 lation of this Act;

4 (2) identify all violations reported by property
5 owners and tenants under section 5(c) of this Act;

6 (3) identify all lawsuits brought by the Attorney
7 General under section 5(d) of this Act;

8 (4) identify all States or political subdivisions
9 that have lost Federal economic development funds
10 as a result of a violation of this Act, as well as de-
11 scribe the type and amount of Federal economic de-
12 velopment funds lost in each State or political sub-
13 division and the Agency that is responsible for with-
14 holding such funds; and

15 (5) discuss all instances in which a State or po-
16 litical subdivision has cured a violation as described
17 in section 2(c) of this Act.

18 (b) DUTY OF STATES.—Each State and local author-
19 ity that is subject to a private right of action under this
20 Act shall have the duty to report to the Attorney General
21 such information with respect to such State and local au-
22 thorities as the Attorney General needs to make the report
23 required under subsection (a).

24 **SEC. 8. SENSE OF CONGRESS REGARDING RURAL AMERICA.**

25 (a) FINDINGS.—The Congress finds the following:

1 (1) The founders realized the fundamental im-
2 portance of property rights when they codified the
3 Takings Clause of the Fifth Amendment to the Con-
4 stitution, which requires that private property shall
5 not be taken “for public use, without just compensa-
6 tion”.

7 (2) Rural lands are unique in that they are not
8 traditionally considered high tax revenue-generating
9 properties for State and local governments. In addi-
10 tion, farmland and forest land owners need to have
11 long-term certainty regarding their property rights
12 in order to make the investment decisions to commit
13 land to these uses.

14 (3) Ownership rights in rural land are funda-
15 mental building blocks for our Nation’s agriculture
16 industry, which continues to be one of the most im-
17 portant economic sectors of our economy.

18 (4) In the wake of the Supreme Court’s deci-
19 sion in *Kelo v. City of New London*, abuse of emi-
20 nent domain is a threat to the property rights of all
21 private property owners, including rural land own-
22 ers.

23 (b) SENSE OF CONGRESS.—It is the sense of Con-
24 gress that the use of eminent domain for the purpose of
25 economic development is a threat to agricultural and other

1 property in rural America and that the Congress should
2 protect the property rights of Americans, including those
3 who reside in rural areas. Property rights are central to
4 liberty in this country and to our economy. The use of
5 eminent domain to take farmland and other rural property
6 for economic development threatens liberty, rural econo-
7 mies, and the economy of the United States. The taking
8 of farmland and rural property will have a direct impact
9 on existing irrigation and reclamation projects. Further-
10 more, the use of eminent domain to take rural private
11 property for private commercial uses will force increasing
12 numbers of activities from private property onto this Na-
13 tion's public lands, including its National forests, National
14 parks and wildlife refuges. This increase can overburden
15 the infrastructure of these lands, reducing the enjoyment
16 of such lands for all citizens. Americans should not have
17 to fear the government's taking their homes, farms, or
18 businesses to give to other persons. Governments should
19 not abuse the power of eminent domain to force rural
20 property owners from their land in order to develop rural
21 land into industrial and commercial property. Congress
22 has a duty to protect the property rights of rural Ameri-
23 cans in the face of eminent domain abuse.

24 **SEC. 9. DEFINITIONS.**

25 In this Act the following definitions apply:

1 (1) ECONOMIC DEVELOPMENT.—The term
2 “economic development” means taking private prop-
3 erty, without the consent of the owner, and con-
4 veying or leasing such property from one private
5 person or entity to another private person or entity
6 for commercial enterprise carried on for profit, or to
7 increase tax revenue, tax base, employment, or gen-
8 eral economic health, except that such term shall not
9 include—

10 (A) conveying private property—

11 (i) to public ownership, such as for a
12 road, hospital, airport, or military base;

13 (ii) to an entity, such as a common
14 carrier, that makes the property available
15 to the general public as of right, such as
16 a railroad or public facility;

17 (iii) for use as a road or other right
18 of way or means, open to the public for
19 transportation, whether free or by toll; and

20 (iv) for use as an aqueduct, flood con-
21 trol facility, pipeline, or similar use;

22 (B) removing harmful uses of land pro-
23 vided such uses constitute an immediate threat
24 to public health and safety;

1 (C) leasing property to a private person or
2 entity that occupies an incidental part of public
3 property or a public facility, such as a retail es-
4 tablishment on the ground floor of a public
5 building;

6 (D) acquiring abandoned property;

7 (E) clearing defective chains of title;

8 (F) taking private property for use by a
9 public utility; and

10 (G) redeveloping of a brownfield site as de-
11 fined in the Small Business Liability Relief and
12 Brownfields Revitalization Act (42 U.S.C.
13 9601(39)).

14 (2) FEDERAL ECONOMIC DEVELOPMENT
15 FUNDS.—The term “Federal economic development
16 funds” means any Federal funds distributed to or
17 through States or political subdivisions of States
18 under Federal laws designed to improve or increase
19 the size of the economies of States or political sub-
20 divisions of States.

21 (3) STATE.—The term “State” means each of
22 the several States, the District of Columbia, the
23 Commonwealth of Puerto Rico, or any other terri-
24 tory or possession of the United States.

1 **SEC. 10. SEVERABILITY AND EFFECTIVE DATE.**

2 (a) SEVERABILITY.—The provisions of this Act are
3 severable. If any provision of this Act, or any application
4 thereof, is found unconstitutional, that finding shall not
5 affect any provision or application of the Act not so adju-
6 dicated.

7 (b) EFFECTIVE DATE.—This Act shall take effect
8 upon the first day of the first fiscal year that begins after
9 the date of the enactment of this Act, but shall not apply
10 to any project for which condemnation proceedings have
11 been initiated prior to the date of enactment.

12 **SEC. 11. SENSE OF CONGRESS.**

13 It is the policy of the United States to encourage,
14 support, and promote the private ownership of property
15 and to ensure that the constitutional and other legal rights
16 of private property owners are protected by the Federal
17 Government.

18 **SEC. 12. BROAD CONSTRUCTION.**

19 This Act shall be construed in favor of a broad pro-
20 tection of private property rights, to the maximum extent
21 permitted by the terms of this Act and the Constitution.

22 **SEC. 13. LIMITATION ON STATUTORY CONSTRUCTION.**

23 Nothing in this Act may be construed to supersede,
24 limit, or otherwise affect any provision of the Uniform Re-
25 location Assistance and Real Property Acquisition Policies
26 Act of 1970 (42 U.S.C. 4601 et seq.).

1 **SEC. 14. RELIGIOUS AND NONPROFIT ORGANIZATIONS.**

2 (a) PROHIBITION ON STATES.—No State or political
3 subdivision of a State shall exercise its power of eminent
4 domain, or allow the exercise of such power by any person
5 or entity to which such power has been delegated, over
6 property of a religious or other nonprofit organization by
7 reason of the nonprofit or tax-exempt status of such orga-
8 nization, or any quality related thereto if that State or
9 political subdivision receives Federal economic develop-
10 ment funds during any fiscal year in which it does so.

11 (b) INELIGIBILITY FOR FEDERAL FUNDS.—A viola-
12 tion of subsection (a) by a State or political subdivision
13 shall render such State or political subdivision ineligible
14 for any Federal economic development funds for a period
15 of 2 fiscal years following a final judgment on the merits
16 by a court of competent jurisdiction that such subsection
17 has been violated, and any Federal agency charged with
18 distributing those funds shall withhold them for such 2-
19 year period, and any such funds distributed to such State
20 or political subdivision shall be returned or reimbursed by
21 such State or political subdivision to the appropriate Fed-
22 eral agency or authority of the Federal Government, or
23 component thereof.

24 (c) PROHIBITION ON FEDERAL GOVERNMENT.—The
25 Federal Government or any authority of the Federal Gov-
26 ernment shall not exercise its power of eminent domain

1 over property of a religious or other nonprofit organization
 2 by reason of the nonprofit or tax-exempt status of such
 3 organization, or any quality related thereto.

4 **SEC. 15. REPORT BY FEDERAL AGENCIES ON REGULATIONS**
 5 **AND PROCEDURES RELATING TO EMINENT**
 6 **DOMAIN.**

7 Not later than 180 days after the date of the enact-
 8 ment of this Act, the head of each Executive department
 9 and agency shall review all rules, regulations, and proce-
 10 dures and report to the Attorney General on the activities
 11 of that department or agency to bring its rules, regula-
 12 tions and procedures into compliance with this Act.

13 **SEC. 16. SENSE OF CONGRESS.**

14 It is the sense of Congress that any and all pre-
 15 cautions shall be taken by the government to avoid the
 16 unfair or unreasonable taking of property away from sur-
 17 vivors of Hurricane Katrina who own, were bequeathed,
 18 or assigned such property, for economic development pur-
 19 poses or for the private use of others.

○

Mr. NADLER. Thank you, Mr. Chairman. For once the Supreme Court defers to the elected officials, and Congress cries foul. The power of eminent domain is an extraordinary one and should be used with great care. All too often, it has been used for private gain or to benefit one community at the expense of another. It is, however, an important tool, making possible transportation networks, irrigation projects and other public purposes. To some extent, all of these projects are economic development projects. Members of Congress are always trying to get these projects for our districts and certainly the economic benefit to our constituents is always a consideration.

Has this bill drawn the appropriate line between permissible and impermissible uses of eminent domain? I think that is one of the questions we will really need to consider. We all know the easy cases, as the majority in *Kelo* said, "the city would no doubt be forbidden from taking petitioner's land for the purpose of conferring a private benefit on a particular private party, nor would the city be allowed to take property under the mere pretext of a public purpose when its actual purpose was to bestow a private benefit."

Which projects are appropriate and which are not can sometimes be a difficult call. Historically, eminent domain has sometimes been used to destroy communities for projects having nothing to do with economic development, at least as defined in this bill. For instance, highways have cut through urban neighborhoods, destroying them. Some of these communities are in my district and have yet to recover from the wrecking ball. Yet that would still be permitted by this bill. Other projects might have a genuine public purpose and yet be prohibited. The rhyme or reason of this bill is not clear.

I believe, as I did in 2005, that this bill is the wrong approach to a very serious issue. The bill will permit many of the abuses and injustices of the past while crippling the ability of State and local governments to perform genuine public duties. The bill would allow takings for private rights of way, pipelines, transmission lines, railroads, private rights of way. It would allow highways to cut through communities and all the other public projects that have historically fallen most heavily on the poor and powerless would still be permitted.

As Hilary Shelton of the NAACP testified when we last considered this legislation, these projects are just as burdensome as projects that include private development as part of them. The bill still allows the taking to give property to a private party, quote, "such as a common carrier that makes the property available for use by the general public as its right," closed quote. Does that mean the stadium? The stadium is privately owned. It is available for use by the general public as a right, at least as much as a railroad. You can buy a seat. Is it a shopping center? You don't even need a ticket. The World Trade Center could not have been built under this law. It was publicly owned but was predominantly leased for office space and retail. Neither could Lincoln Center have been built under this bill. Affordable housing like the HOPE VI and the fabled Nehemiah Program, a faith-based, affordable housing program in Brooklyn, could never have gone forward. Since 2005, there have been new developments that call into question whether Congress should even act at this point.

In response to the *Kelo* decision, the States have moved aggressively to reconsider and amend their own eminent domain laws. More than 40 States have acted in response to the *Kelo* decision. States have carefully considered the implications of this decision and the needs of their citizens. Many States have sharply restricted their use of eminent domain. Others have restricted them somewhat. I question whether Congress should now come charging in and presume to sit as a national zoning board deciding which types of projects are or are not appropriate.

The lawsuits permitted by this bill and the uncertainty of the bill's definitions would cast a cloud over legitimate projects. A property owner or a tenant would have 7 years after the condemnation before he would have to begin the litigation and the inevitable appeals. I wonder if the trial lawyers wrote this bill. The local government would risk all of its economic development funding for 2 years, even for unrelated projects, and face bankruptcy if it guesses wrong about a project. Rational bond underwriters would view the possibility that at some point in the future a city might guess wrong on a project and face municipal bankruptcy as an unreasonable risk. This could devastate the ability of State and local governments to float bonds, even if they never engaged in any prohibited conduct; because, after all, the bondholder looks to the stream of revenue the city will have in the future for the repayment of the bonds. And if based on some future act by some future official, that revenue stream or a good part of it could come to a screeching halt as a result of this bill, you're putting a real cloud—we are talking in real estate law about a cloud on title. Here we are putting a cloud on revenue, which would restrict the ability of State and local governments to issue bonds for any purposes, even if they never abuse the eminent domain laws. If you want to give someone the power to extort an entire city, this is it.

Mr. Chairman, this legislation goes well beyond the hypothetical taking of a Motel 6 to build a Ritz Carlton. It threatens communities with bankruptcy without necessarily protecting the most vulnerable populations. It comes after years of State action in which States have decided which approach would best satisfy their concerns and best protect their citizens. I think it may be that Congress should act in this area; but if so, this legislation is a bludgeon and is not the proper way to act.

I look forward to the testimony of today's witnesses who I hope can help us work through these difficult questions.

And before I yield back the balance of my time, I would like to comment that I understand that Professor Echeverria, who is here to testify today at the normal time of his property class, that his property class is watching our proceedings today. And I would like to welcome them, at least electronically, to our hearing. I yield back the balance of my time.

Mr. FRANKS. Thank you. I hope they are paying attention.

Mr. ECHEVERRIA. I hope so.

Mr. FRANKS. Thank you, Mr. Nadler. We have a very distinguished panel of witnesses today.

Our first witness is Ms. Lori Ann Vendetti. Ms. Vendetti is a homeowner from Long Branch, New Jersey, who along with a group of fellow homeowners fought their city's efforts to forcibly

take their homes and lands and hand it over to private developers who planned to make tens of millions of dollars building—excuse me.

By all means. Forgive me, Mr. Conyers. It is not that I didn't see you. We can back up real quick here. We are going to disengage and I will re-read my part of it. Mr. Conyers is recognized. By all means.

Mr. CONYERS. Thank you, Chairman. After all, I am Chairman emeritus of the full Committee, so I appreciate your consideration.

I think this is an interesting constitutional law question and I am proud of the fact that the Constitution Subcommittee is taking this matter up. I am interested in the witnesses' interpretations of where we are. I think it is very important.

It is not often that the Institute for Justice and the National Association for the Advancement of Colored People end up on the same position on a matter, and that seems to be the case today. On the other hand, the National League of Cities and the National Conference of State Legislators are not in favor of this legislation.

Now, it should be noted that these kinds of close questions have arisen in Detroit, Michigan, where through the process of eminent domain we have had land taken from citizens that resulted in casinos being built or where factories replaced people that were living in their homes.

So it is a very interesting question of where we go now that the Supreme Court has spoken in 2005. Those that support the legislation say that we need a Federal remedy. They also provide a private right of action and they also provide the right of action by tenants. And I think we need to look closely at what and how much of those goals are met.

On the other hand, there are those that say that this Federal remedy is extreme, that it deprives localities of development funds, and that a private right of action is already available under State law and, further, that the right of actions for tenants are legally questionable and may conflict with the rights of the property owner.

And so we gather here today to examine this important decision. And I think it will guide many Members in the Congress in terms of what comes out of this important hearing. And I thank you, Chairman, for this opportunity.

Mr. FRANKS. Thank you, Mr. Conyers.

And I will try this again. And I really apologize for overlooking Mr. Conyers.

We have, again, a very distinguished panel with us today and I'm going to start over, Ms. Vendetti, if it is all right with you.

Our first witness is Ms. Lori Ann Vendetti. Ms. Vendetti is a homeowner from Long Beach, New Jersey, who along with a group of fellow homeowners fought their city's effort to forcibly take their homes and hand the land over to private developers who planned to make tens of millions of dollars building upscale condos. Only after half-a-decade-long legal battle were Ms. Vendetti and her fellow homeowners able to reach a settlement to keep their homes.

Our second witness is Professor John Echeverria. Professor Echeverria is a professor at the Vermont Law School. He previously served for 12 years as executive director of the Georgetown

Environmental Law and Policy Institute at Georgetown University Law Center. Professor Echeverria has written extensively on takings and other aspects of environmental and natural resource law. He has frequently represented State and local governments, environmental organizations, planning groups and others in regulatory takings cases and other environmental litigation in both Federal and State courts.

Our third and final witness is Ms. Dana Berliner. Ms. Berliner serves as a senior attorney at the Institute for Justice where she has worked as a lawyer since 1994. She litigates property rights, economic liberty, and other constitutional cases in both Federal and State courts. Along with co-counsel, Scott Bullock—I know Scott—she represented the homeowners in *Kelo v. New London*. From 2008 through 2011, Ms. Berliner has been recognized as a best lawyer in eminent domain and condemnation law by the publication “Best Lawyers in America.”

We welcome all of you here today. Each of the witnesses’ written statements will be entered into the record in its entirety, and I ask that each witness summarize his or her testimony in 5 minutes or less. And to help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that that 5 minutes has expired.

Before I recognize the witnesses, it is a tradition of this Subcommittee that they be sworn in. So if you would please stand and be sworn.

[Witnesses sworn.]

Mr. FRANKS. Now, I know our first witness, Ms. Lori Vendetti, is beginning. So I recognize Ms. Vendetti for 5 minutes.

**TESTIMONY OF LORI ANN VENDETTI, HOMEOWNER,
LONG BRANCH, NJ**

Ms. VENDETTI. Thank you for this opportunity—

Mr. FRANKS. Ms. Vendetti, you might pull that microphone and turn that one on there.

Ms. VENDETTI. Can you hear me now?

Mr. FRANKS. Yes, ma’am.

Ms. VENDETTI. There we go.

Thank you for this opportunity to testify about legislation to stop Federal funding to local governments that abuse eminent domain for private development. My name, again, is Lori Ann Vendetti and I live in the MTOTSA neighborhood of Long Branch, New Jersey. MTOTSA is an acronym for streets: Marine Terrace, Ocean Terrace and Seaview Avenue. I bought my home in 1995 across the street from my parents’ home in hopes of living closer to them during their retirement years. My parents built their home in 1960 as a summer residence for themselves and their three children. My dad was a truck driver and my mom was a school aide/secretary. Dad woke up at 4 in the morning to go to work to pay for our beachside bungalow he built for his family so we would have something better than he ever had.

When my dad retired in 1989, it became my folks’ year-round residence where they could cherish the memories of the times they

spent with their three children while making new memories with their grandchildren.

I bought my house from a family I had known all my life who lived across the street. The grandson and I were friends growing up. When his grandfather died, they couldn't keep his grandmother in the house anymore and had to sell it. I wasn't the highest bidder, but on a handshake deal they sold me the home with an understanding that she would be able to come back every summer and stay there for as long as she lived. So her life would be changed as little as possible. She had Alzheimer's and never knew about the arrangements and died believing that the house was still hers. I used to mow her lawn and she would say, Does my husband know you're mowing the lawn? And I would say yes, Mrs. Rossi, your husband knows and gave me permission. It made me feel great that her life didn't change at all and I was able to give something back to them.

That is just the kind of neighborhood we had. It is a neighborhood where houses are passed down from one generation to another. It is a quaint little beachside community of modest homes, moderate homes, not mansions, where people know each other. Just a little slice of the American dream.

When the city of Long Branch tried to put an end to that by taking away our homes for private condominium development, we came together and we fought for our rights, just like we would fight for any family member who was sick or in trouble. A few months after I bought my house, the city established a redevelopment zone. We watched as the neighborhood to the south became a sea of bulldozers as houses were demolished to make way for luxury apartments and condominiums, even though the original development plan said our neighborhood would not be seized using eminent domain.

We were lied to. The city quietly stopped giving building permits for home improvements in our neighborhood. Eventually we learned that the city wanted to raze our homes too. They said our properties were blighted, even though the mayor admitted that if other areas looked like our neighborhoods, the city wouldn't even be pursuing redevelopment. In New Jersey, perfectly fine homes like ours can be condemned for reasons like diversity of ownership, meaning each house is owned by a separate family. But every one owning a home of their own is a point of pride in America. It's what we all work so hard for. If owning a home means your home is blighted, then whose house isn't blighted? There is real blight in Long Branch, but the city didn't want to fix that up. They didn't want to fix the abandoned buildings near and around city hall. They wanted our well-kept modest homes so they could sell them to a developer who could build more expensive houses.

Mayor Adam Schneider told us that we had to make this incredible sacrifice for the good of the community. But we were the community. We built that community. It is not right for the government to take away what my family worked so hard for over so many years just to give it to someone else who can make a bigger profit and pay more taxes.

I helped start a citizens group aimed to fight this attack on our property rights. We started talking to the media, we staged a big

rally on the eve of the argument in the *Kelo* case. Lots of people were disheartened in our fight, especially after the Supreme Court handed down their decision ruling that officials in Connecticut could take homes and give them to a private developer with only a promise that there might be more tax revenue from it.

But we didn't give up. As a small token of defiance, I actually painted my house. I came to Long Branch so my parents could enjoy their retirement, with me living across the street. I meant to stay there. In November 2005, the city condemned 11 homes in our neighborhood. We challenged that condemnation in court; but in 2006, the superior court judge ruled that Long Branch was allowed to take our homes under the pretense of blight and give the land to a private developer who planned to make tens of millions of dollars building upscale condos for the wealthy. We appealed that decision and held onto our houses for another 2 years until 2008; a three-judge panel unanimously reversed that decision. We were ecstatic. After years of fighting, we were finally vindicated.

The city announced it would stop its eminent domain action against us and negotiated a settlement that allowed us to stay in Long Branch in the houses that were rightfully ours. As part of the agreement, the city was barred from wrongfully taking people's homes in the name of redevelopment. The city also gave us the same tax abatements that was being offered to the designated private developer so that we could reinvest in our own properties. When the city uses redevelopment area to threaten eminent domain to a whole neighborhood, people stop fixing their homes because the city just plans on bulldozing it.

The city and the developers also contributed to the deterioration of our neighborhood. They stopped paving the roads; the houses that the developers bought from other families were left abandoned and boarded up. They created the blight. As a part of our settlement, the city had to fix the long-neglected street lights, repave all the streets. The developers were forced to immediately demolish all the abandoned homes and the developer plans on building new homes. In fact, they are doing that now. And this time, without trying to clear us residents out without eminent domain.

Our neighborhood has a chance to renew now, but most stories of eminent domain don't end happily like ours did. People across the country lose their homes and their businesses after falling victim to redevelopers who use the same tricks and tell the same lies as our officials did in Long Branch.

This should not happen in America. Congress must send a message to local governments across the country that this abuse of power will not be tolerated.

My parents have since passed away, my mother just 2 months ago. But they were able to die in their dream home, knowing it was safe for their children and their grandchildren to enjoy forever. Everyone should have that right.

Passing this legislation would restore the sacredness and security of everyone's home, an American dream of homeownership. I thank you very much for your time.

Mr. FRANKS. Thank you, Ms. Vendetti. And I offer my own condolences to you.

[The prepared statement of Ms. Vendetti follows:]

Testimony of Lori Ann Vendetti
Before the House Judiciary Subcommittee on the Constitution
April 12, 2011

Thank you for the opportunity to testify about legislation to stop federal funding to local governments that abuse eminent domain for private development.

My name is Lori Ann Vendetti and I live in the MTOTSA neighborhood of Long Branch, New Jersey. MTOTSA is an acronym for the streets Marine Terrace, Ocean Terrace and Seaview Avenue. I bought my home in 1995 across the street from my parents' house in hopes of living closer to them during their retirement years.

My parents built their home there in 1960 as a summer residence for themselves and their three children. My dad was a truck driver and my mom a school secretary. Dad woke up at 4 in the morning to go to work to pay for the beachside bungalow he built for his family, so we'd have something better than he ever had. When my dad retired in 1989, it became my folks' year-round home, where they could cherish the memories of the times they spent there with their children while making new memories with their grandchildren.

I bought my house from a family I had known my whole life. The grandson and I were friends growing up. When his grandfather died, they couldn't keep his grandmother in the house anymore and had to sell it. I wasn't the highest bidder, but on a handshake deal they sold me the home with an understanding that she'd be able to come back every summer and stay there as long as she lived, so her life would be changed as little as possible. She had Alzheimer's and never knew about the arrangement and died believing that the house was still hers. I used to mow the lawn and she'd say, "Does my husband know you're mowing the lawn?" and I'd say, "Yes Mrs. Rossi, you know your husband gave me permission." It made me feel great that her life didn't change, that I was able to give back something to them, though it wasn't monetary—just the way they gave something to me.

That's just the kind of neighborhood we have. It's a neighborhood where houses are passed down from one generation of a family or friends to the next. It's a quaint little beachside community of moderate homes, not mansions, where people know each other—just a slice of the American dream. When the City of Long Branch tried to put an end to that by taking away our homes for a private condominium development, we came together and fought for our rights just like we would fight for any family member who was sick or in trouble.

A few months after I bought my house, the city established a redevelopment zone. We watched as the neighborhood to the south became a sea of bulldozers as houses were demolished to make way for luxury apartments and condominiums. Even though the original redevelopment plan said our neighborhood would not be seized using eminent domain, we were lied to. The city quietly stopped giving building permits for home

improvements. Eventually we learned that the city wanted to raze our homes, too. They said our properties were “blighted,” even though the mayor admitted that if other areas looked like ours, the city wouldn’t be pursuing redevelopment. In New Jersey, perfectly fine homes like ours can be condemned for reasons like “diversity of ownership,” meaning each house is owned by a separate family. But everyone owning a home of their own is a point of pride in America; it’s what we all worked so hard for. If owning a home means your house is blighted, then whose house isn’t blighted?

There is real blight in Long Branch, but the city didn’t want to fix up the abandoned buildings across from city hall. They wanted our well-kept but modest beachside homes so they could sell them to a developer who could build more expensive houses. Mayor Schneider told us that we had to make this “incredible sacrifice” for the good of the community. But we built this community. It’s not right for the government to take away what my family worked so hard for over so many years just to give it to someone who could make a bigger profit and pay more in taxes.

I helped start a citizens group aimed to fight against this attack on our property rights. We started talking to the media. We staged a big rally on the eve of the arguments in the *Kelo* case. Lots of people were disheartened in our fight, especially after the Supreme Court handed down their decision, ruling that officials in Connecticut could take homes and give them to a private developer with only a promise that there might be more tax revenue from it. But we did not give up. As a small token of defiance, I painted my house. I came to Long Branch so my parents could enjoy their retirement with me living across the street, and I meant to stay there.

In November 2005, the city condemned 11 homes in our neighborhood. We challenged the condemnations in court, but in 2006 a Superior Court judge ruled that Long Branch was allowed to take our homes under a pretense of “blight” and give the land over to a private developer who planned to make tens of millions of dollars building upscale condos for the wealthy. We appealed that decision and held onto our homes for two more years until in 2008 a three-judge panel unanimously reversed that decision. We were thrilled. After years of fighting, we were finally vindicated.

The city announced it would stop its eminent domain actions against us, and we negotiated a settlement that allowed us to stay in Long Branch in the houses that were rightfully ours. As part of the agreement, the city was barred from wrongfully taking people’s homes in the name of redevelopment. The city also had to give us the same tax-abatements it was offering to its designated private developer, so that we could reinvest in our properties.

When a city uses a redevelopment area to threaten eminent domain to a whole neighborhood, people stop fixing up their homes because the city just plans on bulldozing it anyway. The city and the developers also contributed to the deterioration of the neighborhood. The city stopped paving the roads, and the houses the developers bought from other families were left abandoned and boarded up, creating the blight they said they were addressing by taking our homes. As part of our settlement, the city had to fix

the long-neglected street lights and repave all the streets. The developers were forced to immediately demolish the abandoned homes. The developer plans on building new houses in the area, this time without trying to clear out the current residents with eminent domain.

Our neighborhood now has the chance to renew. But most stories of eminent domain abuse don't end happily. People across the country lose their homes or their businesses after falling victim to redevelopers who use the same tricks and tell the same lies as our officials did in Long Branch. This should not happen in America. Congress must send a message to local governments across the country that this abuse of power will not be tolerated.

My parents have since passed away, but they were able to die in their dream home knowing it was safe for their children and grandchildren to enjoy forever. Everyone should have that right. Passing this legislation would restore the sacredness and security of everyone's home.

Thank you very much for your time.

Mr. FRANKS. I now recognize Professor Echeverria for 5 minutes.

**TESTIMONY OF JOHN D. ECHEVERRIA, PROFESSOR,
VERMONT SCHOOL OF LAW**

Mr. ECHEVERRIA. Thank you for the opportunity to testify today to express my opposition to the Private Property Rights Protection Act of 2011. I am a professor of law at Vermont Law School where I teach property law—so this is a good preparation.

Mr. FRANKS. Sir, could you pull your mic a little closer to you and turn it on? I think it may not be on.

Mr. ECHEVERRIA. Should I restart?

Mr. FRANKS. If you wish, that would be great. We will start your time over.

Mr. ECHEVERRIA. Thank you for the opportunity to testify today and to express my opposition to the Private Property Rights Protection Act of 2011. I'm a professor of law at Vermont Law School where I teach property, and in a week or so we are going to take up the *Kelo* case. So this testimony will be good preparation for that. However, I am obviously here expressing my personal and professional opinion today.

If this hearing were about whether the use of eminent domain for economic development is a good idea or a bad idea, I would be happy to engage in that discussion. I have referenced in my testimony a 2006 study I co-authored in which we sought to analyze objectively the arguments for the use of eminent domain for economic development, as well as the objections to the use of that power. In the course of our research, we found examples of the use of eminent domain that appeared problematic and others that appear very positive. One overriding conclusion was that in many instances, especially in urban areas and in heavily built-up inner suburbs, eminent domain appears to be a valuable tool to accomplish important redevelopment goals in the face of highly fragmented landownership patterns and recurring holdout problems.

We also found a number of examples where, despite the picture painted by advocates of this legislation, the use of eminent domain enjoyed significant support within the community involved, and even among property owners whose property was subject to eminent domain proceedings.

But the issue before the Committee, I submit, is not whether the use of eminent domain for economic development is a good idea or a bad idea. Instead, the question before the Committee is whether the Congress at this moment in time should consider national legislation dramatically limiting the use of eminent domain for economic development that would constrain every State and local jurisdiction in the country.

The answer to that question, I submit, is “no,” and the reason is that in the wake of the much-debated *Kelo* decision, virtually every State legislature in the country studied proposals, studied the *Kelo* decision, debated the *Kelo* decision, studied reform proposals, held hearings, and in many cases enacted legislation limiting the use of eminent domain in some fashion. In addition, in several States in the aftermath of *Kelo*, ballot measures addressing eminent domain reform were submitted to voters.

All told, over 40 States, 43 States according to some estimates, over four-fifths of all the States in the Nation, have adopted some kind of post-*Kelo* reform measure. Some applaud these reforms and some criticize them. Some think they have gone too far, while others believe the States have not gone far enough.

The critical bottom line, however, is the State legislatures, as well as the voters themselves in some States, have fully and completely engaged on this issue. Given that the States have acted, or in some instances made a very conscious decision not to act, congressional intervention in this issue at this time is unnecessary, would be unwise as a matter of policy and would be highly destructive of the recent efforts by the States to address this issue. It is unnecessary because the States have fully considered this issue. And as I say, more than four-fifths of the States have adopted changes in their eminent domain laws. So in effect, the message of the States to Congress on this issue is: Been there, done that.

It would be unwise for Congress to act because the very different responses of the States to this issue demonstrate that one size does not fit all. Given the wide differences between the States—for example, in terms of population density, the age of the communities, the building stock, redevelopment objectives within each jurisdiction—different States should and do approach the eminent domain issue differently. Some States have adopted severe restrictions on eminent domain, some States have not. Some have focused on providing more procedural protections for landowners, while others have placed substantive limitations on the power of eminent domain. Some have redefined what constitutes a public use, others have not. And so on and so on. When it comes to eminent domain, New York is truly not like South Dakota, and Ohio is truly not like Montana.

Finally, congressional intervention by way of this proposed legislation in particular would be highly destructive of the efforts that States have already made on this issue. The restrictions in this proposed bill are relatively radical, going beyond the steps most States have adopted. Thus the bill would severely interfere with State policy judgments on this issue by imposing, again, a one-size-fits-all solution that would trump, conflict with, and effectively preempt many State laws.

Only the most compelling national interest could justify such a massive, untimely interference with State legislative judgments. And the case for such an intrusion cannot be made here and has not been made here.

I could say a great deal more in opposition to this bill, but I believe my time has run out. So I will reserve my additional points for the Q&A. Thank you, Mr. Chairman.

Mr. FRANKS. Thank you, Professor.

[The prepared statement of Mr. Echeverria follows:]

Testimony of John D. Echeverria
Professor, Vermont Law School
South Royalton, Vermont

Hearing on H.R. 1443,
The Private Property Rights Protection Act of 2011

before the
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives

April 12, 2011

My name is John D. Echeverria. I am a Professor at Vermont Law School where I teach property law, including the law of eminent domain, and frequently write on the topic of takings and property rights. I have represented state and local governments and public interest organizations in judicial proceedings around the country in cases arising under both the federal and state takings clauses. I had the privilege of filing a brief in the U.S. Supreme Court on behalf of the American Planning Association and other organizations in the case of Kelo v. City of New London. Finally, I have followed federal and state legislative debates about potential responses to the Kelo decision over the nearly six years since the decision was issued. I appreciate the opportunity to appear before the Subcommittee this afternoon to express my strong personal opposition to the Private Property Rights Protection Act of 2011.

In my view, reasonable minds can differ about the public value of relying on the eminent domain power to promote economic development and whether state and local officials utilize this tool in a fair and effective fashion. I was the co-author of a report published in 2006, which sought to analyze objectively the arguments for the use of eminent domain for economic development as well as the objections to the use of this power. See Kelo's Unanswered Questions: the Policy Debate Over the Use of Eminent Domain for Economic Development (available at http://forms.vermontlaw.edu/gelpi/current_research/documents/GELPI_Report_Kelo.pdf). One conclusion of that report is that eminent domain is, in many instances, an important tool to accomplish redevelopment objectives in the face of highly fragmented land ownership patterns and recurring holdout problems. Another finding is that the use of eminent domain, though rarely completely free from controversy, often enjoys deep and widespread

community support, including in several illustrative cases we discovered within a few miles of the U.S. Capitol.

But the issue before the Committee is not whether the use of eminent domain for economic development is a good or a bad idea. Instead, the issue is whether the U.S. Congress, at this moment in time, should consider *national* legislation limiting the use of eminent domain for economic development that would be binding on every State and local jurisdiction in the country. I submit that that such legislation is unnecessary, unwise as a matter of policy, and would be highly destructive of the recent efforts by the States to address this specific issue.

The basis for these conclusions is that, in the six years since the Kelo decision was handed down, every or virtually every state legislature in the country has studied proposed reforms on this subject, held hearings on the use of eminent domain, and in many cases enacted new legislation limiting the use of eminent domain. In addition, in several States ballot measures addressing eminent domain reform have been submitted to the voters. All told, approximately 40 States, four-fifths of all the States in the nation,¹ have now adopted some kind of post-Kelo reform measure. Some applaud the reform steps adopted, while others believe that some of these steps have been misconceived. Some believe certain state legislatures have gone too far in curtailing the power of eminent domain, while others believe some States have not gone far enough or have abdicated their responsibility by not imposing any new constraints on this governmental power. The bottom line, however, is that the state legislatures, as well as the voters themselves in some States, have fully engaged on this issue.

¹ Those who closely track state legislative activity in response to Kelo report slightly divergent figures. The National Conference of State Legislatures reports that 39 States enacted legislation or passed ballot measures during 2005 - 2007 in response to the Kelo decision. (See <http://www.ncsl.org/default.aspx?tabid=13252>). Professor Ilya Somin reports that 43 States have enacted post-Kelo reform legislation. See *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn. L. Rev. 2100, 2101 (2009).

Furthermore, in several States the state courts have placed new restrictions on the use of eminent domain for economic development. As I explained in the brief I filed in the Supreme Court in the Kelo case, there has been a long history of state courts imposing additional limitations on the eminent domain power beyond those mandated by the federal constitution; thus, the recent state court cases imposing new post-Kelo limitations are consistent with the historic pattern in this area of law.

Significantly, the States have adopted very different positions on how far they wish to go in curtailing use of the eminent domain power and what kinds of procedural and/or substantive limitations they wish to impose. The National Conference of State Legislatures explains that recently enacted state laws and ballot measures fall into different categories:

Restricting the use of eminent domain for economic development, enhancing tax revenue or transferring private property to another private entity (or primarily for those purposes).

Defining what constitutes public use.

Establishing additional criteria for designating blighted areas subject to eminent domain.

Strengthening public notice, public hearing and landowner negotiation criteria, and requiring local government approval before condemning property.

Placing a moratorium on the use of eminent domain for a specified time period and establishing a task force to study the issue and report findings to the legislature.

[Http://www.ncsl.org/IssuesResearch/EnvironmentandNaturalResources/EminentDomainmainpage/tabid/13252/Default.aspx](http://www.ncsl.org/IssuesResearch/EnvironmentandNaturalResources/EminentDomainmainpage/tabid/13252/Default.aspx)

Looking at the different state responses to Kelo in more detail, the state measures can be divided into three categories made up of roughly equal numbers of States: those that have essentially abolished the use of eminent domain for economic development or at least placed very strong limitations on its use; those that have enacted significant reforms while still allowing

for the continuing use of eminent domain in some circumstances; and those that have adopted no new legislation or adopted only minor changes. I will offer a few examples of each type of reform to illustrate the range of state responses to the Kelo issue.

Strong Limitations: In Florida, legislation enacted in 2006 generally prohibits the taking of land through eminent domain for transfer to private parties except in the case of common carriers, utilities, infrastructure provision, or leases of otherwise public space. See Fla. Stat. Ann § 73.013(1) (a – e) (West 2010). The legislation eliminates government’s power to take property to remove blight; instead it requires the government to determine that an individual property poses a danger to public health or safety before exercising eminent domain. See Fla. Stat. Ann § 73.014. (West 2010). The Florida reform effort, which is widely viewed as one of the most restrictive in the country, is duplicated in several provisions of H.R. 1443.

South Dakota adopted reform legislation that prohibits the use of eminent domain to “take” property “for transfer to any private person, nongovernmental entity or other public – private business entity,” see S.D. Codified Laws § 11-7-22 (2010), and specifically outlaws condemnations “primarily for enhancement of tax revenues.” See S.D. Codified Laws § 11-7-22.1 (2010). Furthermore, in Benson v. State, 710 N.W. 2d 131, 146 (S.D. 2006), the Supreme Court of South Dakota affirmed that the state constitution provides landowners greater protection against eminent domain than the federal constitution; specifically, the Court said that the state constitution “requires that there be a use or right of use on the part of the public or some limited portion of it.”

Moderate Limitations. Minnesota has adopted legislation that restricts municipalities from using eminent domain to transfer property from one owner to another for private commercial development, specifying that “[t]he public benefits of economic development,

including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose.” See Minn. Stat. Ann. § 117.025(11). The effect of this restriction is moderated by inclusion of the phrase “by themselves,” which presumably indicates that a locality can take a property to further economic development if it also has other valid reasons for doing so. Moreover, the statute authorizes the taking of non-“blighted” properties if they are in an area where a majority of properties are blighted, and no feasible alternative solution exists to remediate the blighted properties.” See Minn. Stat. Ann. § 117.027.

Utah adopted several post-Kelo measures that are essentially procedural in nature. For example, a 2007 measure requires approval of a proposed condemnation by two-thirds of the condemning agency’s board, and imposes new, more elaborate public notice requirements on condemning authorities. See Utah Code Ann. § 17C-2-601 (West 2010). In 2008, the Utah legislature adopted a bill which provides a right to repurchase if the condemning authority sells the condemned property and creates a cause of action whereby condemnees can “set aside condemnation for failure to commence or complete construction within a reasonable time.” See Utah Code Ann. § 78B-6-521. Yet another piece of legislation adopted in 2008 prescribes detailed pre-condemnation notice requirements. See H.B. 78, 2008 Leg. Reg. Sess. (Utah 2008).

Modest or No Limitations. In Connecticut, the site of the Kelo case, the State has adopted some relatively limited constraints on the use of eminent domain for economic development. The Connecticut law bars condemnation of private property “for the primary purpose of increasing local tax revenue,” and requires a supermajority vote in municipalities planning to condemn private property. See Conn. Gen. Stat. §§ 8-193(b)(1), 8-127(b)(6)(D) (West 2010). *Id.* § 8-127(b)(6)(D). This obviously allows eminent domain to proceed so long as

enhanced tax revenues is only a secondary purpose of the project, and the super-majority requirement should not be an obstacle to a project that enjoys widespread public support.

Finally, in Texas, although the legislature and the voters have expended a good deal of energy addressing the eminent domain issue, the new laws include so many limitations and qualifications that the net effect is not likely to be a substantial constraint on eminent domain. The Texas legislature enacted a law that prohibits condemnation if the taking “confers a private benefit on a particular private party through the use of the property; is for a public use that is merely a pretext to confer a private benefit on a particular private party; or is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas...” Tex. Gov’t Code Ann. § 2206.001 (b) (Vernon 2008).. The third criterion’s explicit exceptions for municipal community development and for urban renewal in the face of blight indicate that this measure does not, as the first criterion might suggest, ban use of eminent domain to promote private economic development. Subsequently, Texas voters adopted a constitutional amendment which, among other things, altered the definition of “public use,” mandating that condemnations only proceed for “ownership, use and enjoyment of the property” by the public. H.R.J. Res. 14 81st Leg. Reg.Sess (Tex. 2009). However, the amendment allows condemnations with incidental private use, prohibiting only the taking of private land for the *primary* purpose of economic development or an increase in tax revenue, which seems to implicitly allow the continued use of eminent domain so long as these are not the primary purposes. Finally, and most recently, the Governor of Texas vetoed legislation that would have eliminated the so-called blight exception.

These examples obviously provide only a sampling of how different States across the country have approached the use of eminent domain for economic development. But these examples should be sufficient to illustrate the widely differing perspectives on eminent domain that exist across the country and the divergent ways that States that have opted for reform have pursued this agenda.

In light of the extensive policy debates and legislative activity at the state level, it is unnecessary for Congress to enact legislation addressing the use of eminent domain for economic development. The States have responded forcefully (if not in uniform fashion) to public concerns about the potential for abuse of the eminent domain power. Many of these state measures have clearly accomplished dramatic change. The social and economic consequences of some measures, as well as their effects on individual landowners, remain to be determined based on experience. Given this flood of activity at the state level on the eminent domain issue, now is not the time for Congress to intervene.

Moreover, in light of the diversity of attitudes and strategies on eminent domain in the different States, it would be unwise for Congress to attempt to enact national legislation on this issue. Thoughtful policy-making on the eminent domain issue calls for balancing the value and importance of the eminent domain tool in pursuing vitally important economic development with land owners' understandable desires to use and dispose of their property with as little government interference as possible. Given the wide differences between the States – in terms of population density, the age of communities and building stocks, and redevelopment objectives, among other things – it stands to reason that different States will and should approach the eminent domain issue differently. When it comes to eminent domain, New York is not like

South Dakota, and Ohio is not like Montana. National legislation on this subject would be unwise because it would disregard and override the differences within our federal system.

Finally, it would be an extreme intrusion on the States for Congress to legislate at this time on the subject of the use of eminent domain for economic development by States and localities. Over the last half dozen years every or virtually every state legislature has either adopted post-Kelo reform measures or made the affirmative decision not to do so. One-size-fits-all national legislation would, in most cases, contradict and preempt these recently concluded state deliberations, substituting Congress's view on how eminent domain should be pursued for the highly varied and carefully considered views of the States. Only the most compelling national interest could justify such a massive, untimely intrusion into state policy-making, and the case for such an intrusion cannot be made here.

One additional note. It is hardly an accident that the States have taken the lead in determining what reforms are needed to the eminent domain process. The Supreme Court in Kelo rejected the argument that the use of eminent domain to promote economic development violates the federal Constitution. But, at the same time, the Court explicitly invited the States to decide whether they wished to provide protections for property owners against eminent domain that went beyond the federal Constitution:

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the ground upon which takings may be exercised.

545 U.S. at 489. In the wake of the decision, state legislators and policy advocates obviously took up the Supreme Court's invitation. In particular, the Institute for Justice, following Kelo,

launched what it describes on its website (see <http://www.castlecoalition.org/about>) as “an aggressive initiative to effect significant and substantial reforms of state and local eminent domain laws.” In light of the enormous attention state legislators have given this issue over the last half-dozen years, and the Institute for Justice’s not inconsiderable success in achieving its policy objectives at the state level, one wonders what the Institute’s rationale is for now supporting action at the national level. Is it that not every State has gone as far as the Institute thinks they should, and therefore Congress needs to step in with national legislation that would preempt the recent State efforts and trump the policy judgments so recently made at the state level? Apparently so. The better conclusions to draw from the recent spate of state policy-making on eminent domain are that the States have already responsibly addressed the eminent domain issue, they have done so in a way that achieves a different balance in each State, time will tell how some of these reforms will work out, and Congress should not seek to intervene in this issue now.

Given my position that Congress should refrain from attempting to craft national legislation that would attempt to impose a one-size-fits-all solution on the States and localities, I have little to offer in the way of detailed commentary on the language of the bill itself. I will observe, however, that the restrictions on eminent domain in the bill are relatively radical, going far beyond the steps most States have adopted, perhaps most closely rivaling the restrictions adopted in Florida. Thus, it is clear that the interference with state policy judgments if this bill were adopted would be extensive. Another noteworthy feature of the bill is that it would not directly restrict the States and localities from exercising the eminent domain power, but instead would subject them to the punitive *post hoc* penalty of losing two years of federal economic development funding if it turns out they have run afoul of the bill’s general and sometimes

vague prohibitions. This indirect approach is arguably mandated by the limited constitutional power of the federal government to instruct the States and their subdivisions on how to conduct their business. But it certainly produces an awkward piece of proposed legislation that could have disastrous fiscal consequences for State and localities, most of which are now facing financial challenges that rival if they do not surpass those facing the national government. The bill provides that a State or locality could “cure” a violation after the fact, but it is unclear how effective that cure could be if the development has already gone forward and/or if the condemnee has reinvested the compensation proceeds in another property. Ultimately, the effect of the bill, given the difficulty of predicting the outcome of litigation, and the severity of the potential penalties, might be to simply freeze a great deal of proposed redevelopment activity across the country, imposing yet another burden on States and localities and creating an additional drag on our struggling economy.

Thank you for the opportunity to present this testimony. I will be pleased to respond to any questions that members of the Committee may have.

Mr. FRANKS. And now I recognize Ms. Berliner for 5 minutes.

TESTIMONY OF DANA BERLINER, INSTITUTE FOR JUSTICE

Ms. BERLINER. Thank you, Mr. Chairman. I’m very happy to be testifying before the Subcommittee today. I testified before the same Subcommittee when the bill was first introduced and first

passed in 2005. And some things have changed since then, as we have heard today, and some things haven't changed since then.

The main thing that has not changed since then is that this proposed law is still needed to remedy the abuse of eminent domain that was made possible and even encouraged by the *Kelo* decision. When the Supreme Court decided *Kelo*, it decided that even the mere possibility of more jobs and more taxes was a good enough reason under the U.S. Constitution to take someone's home away from them and give it to a private party. That is what happened in the *Kelo* case. That project got Federal money. Since then—and it is now 6 years later—nothing has been built there. That project did not result in economic development. It resulted in economic destruction. Those people lost their homes for nothing and they lost their homes, again with the assistance of Federal funds. The court decided that there would be no Federal constitutional protection essentially against eminent domain abuse and therefore no floor of protection, no consistency among the States.

Now, what you have heard today is that a lot of States changed their laws. And that is true, a lot of States did; some to a greater extent, some to a lesser extent. If you live in one of the 20 or so States that passed strong protections, that's great. And if you don't, you still don't have any Federal rights protection at all against eminent domain abuse.

What that means is it depends on your State line. If you live in New Hampshire, your home is pretty safe. If you live in New Jersey, not so much. Maybe if you fight for 5 to 10 years in court, you might get to keep your home. Maybe, maybe not. It depends. If you live in New York, you don't have a prayer. Neither New Jersey nor New York changed their laws. California, which also is a huge abuser of eminent domain, changed their laws only a little bit. And they have so many procedural barriers to suit that, again, it is very difficult to have any protections there.

So the goal of this proposed law is to do what is in the power of Congress to establish minimum standards nationwide, and that is something that is still lacking, that exists for virtually every other constitutional right but not for this.

Even after *Kelo*, Federal money continues to be used to support projects that use eminent domain for private development. It certainly supports the agencies that engage in these takings. The money usually comes in the form of either Department of Transportation or HUD, although there are other kinds of economic development funding as well.

And Congress has previously attempted to limit the use of Federal funds for eminent domain abuse through what was called the Bond amendment. And that was just a spending limitation. The problem is, if it is violated there is nothing you can do. So people have tried to bring this up in court. There is no right of action. People call us and say, hey, the project is taking our property for another private use, it has got Federal money, what can we do? And the answer is, Call the agency. But as far as we know, nothing has ever happened. There has never been an investigation. There has never been a consequence.

This bill on the other hand does several very important things. It cuts off funding to agencies that abuse eminent domain. It does

that in a way that complies with constitutional precedent. It has to be done through the spending power.

The bill also gives guidance about what uses of eminent domain are permitted and what uses aren't permitted, so that agencies will have rules to apply. It provides for reporting, which is very important. It is very difficult to figure out where the Federal money is going when you attempt to research this. And it gives an avenue for enforcement. So this bill contains all the elements it needs to be effective and to stay within constitutional limits.

It is within the power of Congress to remove or substantially diminish the specter of condemnation for private development in this country. This bill is necessary to protect thousands of citizens from losing their homes and their businesses for private gain. And it has been inspiring to work with both parties on this important issue.

I want to thank this Committee for its leadership and for its efforts on this issue.

Mr. FRANKS. Well, thank you, Ms. Berliner.

[The prepared statement of Ms. Berliner follows:]

Testimony of Dana Berliner
Senior Attorney, Institute for Justice
United States House Judiciary Subcommittee on the Constitution
April 12, 2011

Thank you for the opportunity to testify regarding eminent domain abuse, an issue that has received significant national attention in the wake of the U.S. Supreme Court's dreadful decision in *Kelo v. City of New London*. This committee is to be commended for responding to the American people by examining this misuse of government power.

My name is Dana Berliner, and I am a senior attorney at the Institute for Justice, a nonprofit public interest law firm in Arlington, Virginia, that represents people whose rights are being violated by government. One of the main areas in which we litigate is property rights, particularly in cases where homes and small businesses are taken by the government through the power of eminent domain and transferred to another private party for private development. I have represented property owners across the country fighting eminent domain for private gain, and I am one of the lawyers at the Institute who represented the homeowners in *Kelo v. City of New London*, the case in which the U.S. Supreme Court ruled by a bare majority that eminent domain could be used to transfer perfectly fine private property to a private developer based simply on the mere promise of increased tax revenue. I also authored two reports about the use of eminent domain for private development throughout the United States (available at <http://www.castlecoalition.org/312> and <http://www.castlecoalition.org/189>).

The *Kelo* case was the final signal that the U.S. Constitution simply provides no protection for the private property rights of Americans. Indeed, the Court ruled that under the U.S. Constitution, it is okay to use the power of eminent domain when there's the mere *possibility* that something else could make more money than the homes or small businesses that currently occupy the land, as long as the project is pursuant to a development plan. It's no wonder, then, that the decision caused Justice O'Connor to remark in her dissent: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory." One Institute for Justice study found that eminent domain disproportionately impacts minorities, the less educated, and the less well-off. That report, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse*, can be found at <http://www.ij.org/1621> and is the subject of "Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?" (*Urban Studies*, October 2009, vol. 46, no. 11, at 2447-2461).

Because of this threat, there has been a considerable public outcry against this closely divided decision. Overwhelming majorities in every poll taken after the *Kelo* decision have condemned the result (see <http://www.castlecoalition.org/43>). Several bills have been introduced in both the House and Senate over the past six years to combat the abuse of eminent domain, with significant bipartisan support. The original version of the bill, H.R. 4128 in the 109th Congress, passed the House by a vote of 376 – 38.

The use of eminent domain for private development has become a nationwide problem,
and the Court's decision encouraged further abuse in its wake.

Eminent domain, called the “despotic power” in the early days of this country, is the power to force citizens from their homes, small businesses, churches and farms. Because the Founders were conscious of the possibility of abuse, the Fifth Amendment provides a very simple restriction: “[N]or shall private property be taken for public use without just compensation.”

Historically, with very few limited exceptions, the power of eminent domain was used for things the public actually owned and used—schools, courthouses, post offices and the like. Over the past 60 years, however, the meaning of public use has expanded to include ordinary private uses like condominiums and big-box stores.

The expansion of the public use doctrine began with the urban renewal movement of the 1950s. In order to remove so-called “slum” neighborhoods, cities were authorized to use the power of eminent domain. Urban renewal wiped out entire communities, typically African American, earning eminent domain the nickname “negro removal.” (See “Eminent Domain & African Americans: What is the Price of the Commons?” by Dr. Mindy Fullilove at <http://www.castlecoalition.org/187>.) This “solution,” which critics and proponents alike consider a dismal failure, was given ultimate approval by the Supreme Court in *Berman v. Parker*. The Court ruled that the removal of blight was a public “purpose,” despite the fact that the word “purpose” appears nowhere in the text of the Constitution and government already possessed the power—and still does—to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened up a Pandora’s box, and in the wake of that decision properties are routinely taken pursuant to redevelopment statutes when there is absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hopes to increase its tax revenue.

The use of eminent domain for private development is widespread. We documented more than 10,000 properties either seized or threatened with condemnation for private development in the five-year period between 1998 and 2002. Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnation and threatened condemnations. For example, in Connecticut, we found 31, while the true number of condemnations was 543.

After the Supreme Court actually sanctioned this abuse in *Kelo*, the floodgates opened; the rate of eminent domain abuse tripled in the one year after the decision was issued (see *Opening the Floodgates: Eminent Domain Abuse in a Post-Kelo World*, available at <http://www.castlecoalition.org/189>). With the high court’s blessing, local government became further emboldened to take property for private development. For example:

- Freeport, Texas: Hours after the *Kelo* decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an \$8 million private boat marina).
- Oakland, Calif.: A week after the Supreme Court’s ruling, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family had owned

since 1949. Revelli and a neighboring business owner had refused to sell their property to make way for a new housing development. Said Revelli of his fight with the city, “We thought we’d win, but the Supreme Court took away our last chance.”

- Sunset Hills, Mo.: Less than three weeks after the *Kelo* ruling, Sunset Hills officials voted to allow the condemnation of 85 homes and small businesses for a shopping center and office complex.
- Mount Holly, N.J.: For the past decade, township officials have been using the threat of eminent domain to buy up and tear down over 300 row homes in the Gardens, a predominantly African American and Hispanic community that was home to elderly widows and first-time homebuyers. The township wants to transfer the land to a private developer for luxury townhomes and apartments.
- New York, N.Y.: Last year, the New York Court of Appeals—the state’s highest court—allowed the condemnation of perfectly fine homes and businesses for two separate projects. First, a new basketball arena and residential and office towers in Brooklyn, and then for the expansion of Columbia University—an elite, private institution—into Harlem.

In the immediate wake of *Kelo*, courts used the decision to reject challenges by owners to the taking of their property for other private parties. On July 26, 2005, a court in Missouri relied on *Kelo* in reluctantly upholding the taking of a home for a shopping mall. As the judge commented, “The United States Supreme Court has denied the Alamo reinforcements. Perhaps the people will clip the wings of eminent domain in Missouri, but today in Missouri it soars and devours.” On August 19, 2005, a court in Florida, without similar reluctance, relied on *Kelo* in upholding the condemnation of several boardwalk businesses for a newer, more expensive boardwalk development.

Despite the nationwide revolt against *Kelo*, federal action is still needed, as federal law and funds currently support eminent domain for private development.

In the wake of the *Kelo* decision, 43 states enacted reforms that to varying degrees restrict the power of the government to seize for private development. 22 states passed legislation that effectively prevents the abuse of eminent domain for private gain, while 21 states still have more progress that needs to be made legislatively to effectively protect private property owners from this abuse of power. Seven states have yet to do anything in the past six years since *Kelo* to stop the abuse of eminent domain.

Federal agencies themselves rarely if ever take property for private projects, but federal funds support condemnations and support agencies that take property from one person to give it to another. There has been some improvement from state legislative reform, but not enough. Although eminent domain for private development is less of a problem in nearly half of the states in the wake of *Kelo*, it remains a major problem in many other states. Unfortunately, some of the states that were the worst before *Kelo* in terms of eminent domain abuse did little or nothing to reform their laws. New York remains the worst state in the country, and it has gotten even worse since *Kelo*. California did pass reform, but California cities have virtually ignored the new law, relying on the astonishing difficulty of bringing legal action to challenge redevelopment designations. Missouri, also a major abuser, passed only weak reform, as did Illinois. In other

states, like Washington and Texas, the prospect of federal money for Transit Oriented Development has inspired municipalities to seek enormous areas for private development (areas not needed for the actual transportation). Eminent domain abuse is still a problem, and federal money continues to support the use of eminent domain for private commercial development. A few examples of how federal funds have been used to support private development include:

- New London, Conn.: This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes were taken for a private development project that was planned to include a hotel, upscale condominiums, and office space. The project received \$2 million in funds from the federal Economic Development Authority—and ultimately failed.
- Brea, Calif.: The Brea Redevelopment Agency demolished the city's entire downtown residential area, using eminent domain to force out hundreds of lower-income residents. The Department of Housing and Urban Development (HUD) launched an investigation into the potential misappropriation of federal development grants totaling at least \$400,000, which made their way to the city in the late 1980s and early 1990s. FBI agents investigated the Redevelopment Agency based on evidence that the Agency used coercive tactics to acquire property.
- Garden Grove, Calif.: Garden Grove has used \$17.7 million in federal housing funds to support its hotel development efforts—efforts that included, at least in part, the use of eminent domain. In 1998, the City Council declared 20 percent of the city “blighted,” a move that allowed the city to use eminent domain for private development. Using that power—and federal money—the city acquired a number of properties, including a mobile-home park full of senior citizens, apartment renters and small businesses, in order to provide room for hotel development.
- National City, Calif.: In 2007, the National City Community Development Commission, which receives significant federal funding, authorized the use of eminent domain over nearly 700 properties in its downtown area, calling the area “blighted.” One of the planned projects was the replacement of the Community Youth Athletic Center, a boxing gym and mentoring program for at-risk youth, with an upscale condominium project. The gym (represented by my organization, the Institute for Justice) has been challenging that eminent domain authorization ever since.
- Normal, Ill.: Normal officials condemned the properties of Orval and Bill Yarger and Alex Wade, including the Broadway Mall, for a Marriott Hotel and accompanying conference center being built by an out-of-town developer. The town secured at least \$2 million in federal funding for downtown projects, and once the cost of the Marriott nearly doubled, approved giving the developer \$400,000 in Community Development Block Grant money.
- Baltimore, Md.: In December 2002, the Baltimore City Council passed legislation that gave the city the power to condemn about 3,000 properties for a redevelopment project anchored by a biotechnology research park. The development would contain space for biotech companies, retail, restaurants and a variety of housing options. HUD provided a \$21.2 million loan to the city. Many projects in Baltimore involving the use of eminent domain for private development are overseen by the Baltimore Development Corporation, which receives federal funding.
- St. Louis, Mo.: In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corporation demolished six square blocks of buildings, including

approximately 200 units of housing, some run by local non-profits. The older housing was to be replaced by luxury housing. The project received at least \$3 million in Housing and Urban Development (HUD) funds, and may have received another \$3 million in block grant funds as well.

- Elmira, N.Y.: Eight properties—including apartments, a garage, carriage house and the former Hygeia Refrigerating Co.—were condemned and six were purchased under the threat of eminent domain for Elmira’s South Main Street Urban Development project. HUD funds were used to create a 6.38-acre lot for development.
- New Cassell, N.Y.: St. Luke’s Pentecostal Church saved for more than a decade to purchase property and move out of the rented basement where it held services. It bought a piece of property to build a permanent home for the congregation. The property was condemned by the North Hempstead Community Development Agency, which administers funding from HUD, for the purpose of private retail development. The land remained vacant for at least six years.
- New York, N.Y.: Developer Douglas Durst and the Bank of America enlisted the Empire State Development Corporation to clear a block of midtown Manhattan for their 55-story Bank of America Tower at One Bryant Park. The ESDC put at least 32 properties under threat of condemnation and initiated eminent domain proceedings. All of the owners eventually sold. Durst had abandoned the project prior to 9/11, but an infusion of public subsidies—including \$650 million in the form of Liberty Bonds—and a \$1 billion deal with Bank of America put plans back on track.
- Ardmore, Pa.: The Ardmore Transit Center Project had some actual transportation purposes, but Lower Merion Township officials also planned to remove several historic local businesses, many with apartments on the upper floors, so that it could be replaced with mall stores and upscale apartments. The project received \$6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. But for a tirelessly waged grassroots battle—which no American should have to wage to keep what is rightfully theirs—that ultimately stopped the project, the federal government would be complicit in the destruction of successful, family-owned small businesses.

Congress can and should take steps to ensure that federal funds do not support the abuse of eminent domain.

The *Kelo* decision continues to cry out for Congressional action, six years later. Even Justice Stevens, the author of the opinion, stated in a speech that he believes eminent domain for economic development is bad policy and hopes that the country will find a political solution.

Some states did, but those reforms not embedded in state constitutions will always be subject to repeal or exception whenever a pie-in-the-sky project catches the eye of state legislators or local officials. Congress needs to finally make its opposition heard on this issue, and the sponsors of this bipartisan legislation are all to be commended for their efforts to provide protections that the Supreme Court denied in 2005.

Funding restrictions will only be effective if there exists a procedure for enforcement, so any reform must also include a mechanism by which the economic development funding for the state or local government can be stopped. Part of this procedure should be a private method of

enforcement, whether through an agency or court, so that the home or small business owners or, importantly, tenants that are affected by the abuse of eminent domain, or any other interested party like local taxpayers, can alert the proper entity and funding can be cut off as appropriate. The diligence of ordinary citizens in the communities where governments are using eminent domain for private development, together with the potential sanction of lost federal funding, will most certainly serve to return some sense to state and local eminent domain policy—especially in the absence of substantive eminent domain reform that effectively protects property owners.

This legislation also allows cities and agencies to continue to receive federal funding when they acquire abandoned property and transfer it to private parties. When the public thinks about “redevelopment,” it is most concerned with the ability to deal with abandoned property. With this legislation, cities can continue to clear title to abandoned property and then promote private development there without risking losing their federal funding. Additionally, the clear and limited exception for taking property to remove “harmful uses of land provided such uses constitute an immediate threat to public health and safety” will discourage cities from taking perfectly fine homes and businesses as is common practice under many state’s vague blight laws.

Congress’s previous efforts to restrict the use of certain federal funds for eminent domain (from the Departments of Transportation, Treasury and/or Housing and Urban Development) have unfortunately been ineffective. There does not seem to be any way for individuals to enforce this restriction. Nor does it appear that any of these departments have ever investigated a violation of the spending limitation or enforced the limitation. Instead, the local governments that receive the funds are expected to understand and apply the prohibition. In other words, the same local governments that are planning to use eminent domain are also expected to limit their own funding, despite the fact that there is no prospect of enforcement. It is therefore not surprising that the funding restriction has not protected the rights of people faced with eminent domain.

Given the climate in the states as a result of *Kelo*, congressional action would do even more to both discourage the abuse of eminent domain nationwide and encourage sensible state-level reform. Reform at the federal level would be a strong statement to the country that this awesome government power should not be abused. It would restore the faith of the American people in their ability to build, own and keep their homes and small businesses, which is itself a commendable goal.

It should also be noted that development is not the problem—it occurs everyday across the country without eminent domain and will continue to do so should this committee act on this issue, which I recommend. Public works projects like flood control will not be affected by any legislation that properly restricts eminent domain to its traditional uses since those projects are plainly public uses. But commercial developers everywhere need to be told that they can only obtain property through private negotiation, not public force and that the federal government will not be a party to private-to-private transfers of property. As we demonstrate in a recent study, restricting eminent domain to its traditional public use in no ways harms economic growth. (See report at <http://ij.org/1618>, and Carpenter, D.M. and John K. Ross. “Do Restrictions on Eminent Domain Harm Economic Development?” *Economic Development Quarterly*, 24(4), 337-351.) Indeed, congressional action will not stop progress.

Conclusion

In this economy, Congress does not need to be sending scarce economic development funds to projects that not only abuse eminent domain and strip hard-working, tax-paying home and small business owners of their constitutional rights, but projects that may ultimately fail. Let New London be a lesson: After \$80 million in taxpayer money spent, years tied up in litigation and a disastrous U.S. Supreme Court ruling, the Fort Trumbull neighborhood is now a barren field home to nothing but feral cats. The developer balked and abandoned the project, and Pfizer—for whom the project was intended to benefit—also left New London.

Eminent domain sounds like an abstract issue, but it affects real people. Real people lose the homes they love and watch as they are replaced with condominiums. Real people lose the businesses they count on to put food on the table and watch as they are replaced with shopping malls. And all this happens because local governments prefer the taxes generated by condos and malls to modest homes and small businesses. Federal law currently allows expending federal funds to support condemnations for the benefit of private developers. By doing so, it encourages this abuse nationwide. Using eminent domain so that another richer, better-connected person may live or work on the land you used to own tells Americans that their hopes, dreams and hard work do not matter as much as money and political influence. The use of eminent domain for private development has no place in a country built on traditions of independence, hard work, and the protection of property rights.

Again, thank you for the opportunity to testify before this subcommittee.

Mr. FRANKS. I'm going to recognize myself for 5 minutes for questions. And I will begin with you, Ms. Berliner, if I can.

Professor Echeverria argues that we should leave it to the States to decide what restrictions they want to place on the use of eminent domain. However, this argument seems, in my mind, to ignore the Congress' role in deciding how Federal tax dollars are spent,

because the bill simply declares that Federal economic development money will not be spent in States and localities that use eminent domain for private economic development. If States and localities want to use eminent domain for economic development purposes, even under the bill they are still free to do so. They simply must forego receiving Federal economic development funds.

So my question, Ms. Berliner, in your mind, is there a federalism problem with the legislation?

Ms. BERLINER. There isn't. The reason that the bill was designed in the way that it is designed is that it complies with the U.S. Supreme Court's decision in *South Dakota v. Dole* about the way that Congress can do these kinds of restrictions, and it is indeed through the spending power. So Congress can't order a locality not to use eminent domain for economic development, but it can withhold its funds. So there is not a federalism problem—there is not a constitutional problem in that way. And again, what this bill does is it creates consistency across the States, which is indeed the role of Congress.

Mr. FRANKS. Well, some opponents to the legislation expressed concerns that if we restrict the ability of States and localities to take private property for private economic development purposes, that we will unduly stifle economic growth. And I would like to hear your response to that argument.

Ms. BERLINER. Well, there's a couple of answers to that. One is we actually did a study, and it has been published now in a peer-reviewed journal as well, showing that among the States that did restrictions—and some of those did very minor restrictions that didn't really do anything, some did serious restrictions—there was no difference in the rate of economic growth based on the changes in eminent domain.

It is also true that there are ways to do economic development locally without using eminent domain. And a good example of that actually is the city of Anaheim instituted a program for its redevelopment area that was quite significant, resulted in huge economic development increases, but did not use eminent domain. So there are tools available to cities to do development without eminent domain.

And what this bill would mean is that cities would have to either—if they really wanted to use eminent domain for economic development, do it without Federal funding. Or much more likely, they would find a way to do economic development without using eminent domain. It is perfectly possible. But despite the fact that every city in the country will tell you they only use it as a last resort, that is not true. And this would mean it would not get used nearly as much as it does now.

Mr. FRANKS. Ms. Berliner, some, of course, argue that the Private Property Rights Protection Act will make private economic development more difficult because without eminent domain, some property owners within a proposed redevelopment zone will just hold out and hold onto their property and not sell it.

I guess my question is do we generally ignore constitutional protections such as free speech simply because enforcement would make things more difficult?

Ms. BERLINER. Well, we certainly don't. The point of constitutional rights is they protect everyone. And that means with speech, sometimes the speech that is protected is undesirable speech, sometimes it is wonderful speech. And that is going to be true of every constitutional right. They protect everyone. And in this case, it is possible that some people will hold out.

But, I mean, you could say that Ms. Vendetti held out. She actually didn't want to go and she got to stay. It took her years to do it. Susette Kelo didn't want to move. And what happens is a lot of people don't want to move either, but under the kind of pressure that is exerted during these projects, some of them give up. A lot of the people are elderly, a lot of them are not very educated and they are not able to go through the stress of facing that sort of condemnation. But this will enable them to stay in their homes if they want to do so.

Mr. FRANKS. Well, would you parse, just for the Committee, sort of the new definition between public use and kind of the way that they twist it around to be private economic development? That's my last question.

Ms. BERLINER. Well, of course, originally eminent domain was used for public uses, meaning at that time, really, public ownership almost entirely and sometimes things that served as public utilities. That changed significantly with the decision in *Berman v. Parker* when the U.S. Supreme Court upheld eminent domain for what was called slum removal, now universally recognized as a complete disaster that basically destroyed inner-city neighborhoods and resulted in not the kind of development they were expecting. That is something actually Mr. Nadler was referring to. That was a huge problem. But it has now gradually evolved, and with *Kelo*, really reached the bottom of—anything is supposedly a public use, any supposed public benefit is a public use. I know the Supreme Court said that it wouldn't be a public use if it were taking from A to B. But that's what it means when you say you can take someone's house and give it to a private developer to put in a private project. It is the taking from A to B and that is, unfortunately, where we are now with the Supreme Court's decision.

Mr. FRANKS. Well, thank you, Ms. Berliner. And I now recognize Mr. Nadler for 5 minutes.

Mr. NADLER. Thank you. I must admit I'm somewhat ambivalent about this bill. I think, on balance, the bill does a lot of harm. But we have obviously seen abuses of eminent domain over the years. And one of the problems with this bill is that it doesn't really stop a lot of that abuse. You see neighborhoods in the South Bronx, for instance, destroyed by putting a highway through the middle of it because they didn't have the political power to stop it. This wouldn't change that.

We've seen railroads—not so many in recent years, but in earlier years—given huge tracts of land, seized by eminent domain in some cases—in order to get them to build the line.

One of the problems, it seems to me, with this bill is the structure of the remedy. It is one thing to say—and it might be a good thing to say—to establish the right of action, to go into court and get an injunction. But to say to a local government or a State government, if you take a property by eminent domain and later, 7

years later, or an action is brought up to 7 years later—and maybe the action takes 2 years—so 9 years later a court decides that this was improper, that this was private, even though you may have thought it was public, it was private, then you lose 2 years of all economic development aid.

This seems to me—and I would like to ask Ms. Berliner this question. It seems to me—we talk about a cloud on entitlement in property law. This puts a cloud on revenue. How does the State—which has no intention of, and maybe it never does abuse eminent domain—float bonds if its future revenue streams are subject to unpredictable revocation?

Ms. BERLINER. Well, I think there were two questions in there. One was about if there is a way to include in the bill something that would deal with the situations where perhaps the construction of a highway destroys a residential neighborhood—

Mr. NADLER. No. That wasn't my real question. The question is—I'm saying that happens. I don't know how you write a bill to stop that. My real question is, the basic structure of this bill, using the spending power it seems to me, puts a cloud on revenue on any State or local government that will make it very difficult or much more costly to float bonds because of the possibility that 10 years later or 5 years later, if the bond is for 30 years let us say, during the lifetime of the bond, some future official will do something wrong and some part of the revenue stream on which you generally relied as your backstop for the bonding would suddenly go up in smoke.

Ms. BERLINER. Okay. Well, there's two—I guess I have two responses to that. One would be there is a cure provision, which is you give the property back. The second is this wouldn't arise unless there was eminent domain going on.

Mr. NADLER. No. On the contrary. The possibility that that might happen in the future would be enough, I think, to cloud the revenue.

Ms. BERLINER. I don't—

Mr. NADLER. I think the bond rating agencies would certainly—let me ask Professor Echeverria. Would you comment on that? You've done property.

Mr. ECHEVERRIA. I think it is a very serious problem because it will be hard for a community to know, based on the very vague and general terms of the statute, whether or not a private party—any private party—tenant, landowner, or the Attorney General—could bring an action challenging an eminent domain project that is long completed, at which point presumably the project might have to be upended. If that risk were out there, it seems very hard to know how a community could get a project underway to begin—how they could get—

Mr. NADLER. I will go even further. If the State wanted to borrow money having nothing do with that project for something else, the very possibility—and if no one had thought of that project yet, but the possibility that someone in the future may think of that project, and the State may fall afoul of this law in a completely unpredicted project, simply by introducing that uncertainty would cloud the revenue stream and increase the cost of borrowing the money and making it impossible to borrow the money for a legitimate project.

Mr. ECHEVERRIA. For the entire community. For all purposes.

Mr. NADLER. Right. That is my point.

Ms. BERLINER. I don't think that it would work like that. There's a couple of different issues. One is that States are virtually never the abusers. It is almost always the city.

Mr. NADLER. It is the local government. Same question. The problem is if this ever occurred in a local government, if it was big enough it could easily send the local government into bankruptcy, even if they didn't—if you got bonds out there and now you lose your revenue because you made the wrong decision on a given project, that could easily send the local government into bankruptcy.

Ms. BERLINER. It just wouldn't arise, though, without eminent domain. So I think what you are asking is, is there a way to achieve a determination of the validity of the eminent domain under this bill prior to 7 years, which, I mean, there may be, especially through the Attorney General. That seems to me like a way that you could address this without getting rid of the bill but just having an easier way that the determination can be made.

Mr. NADLER. My time has expired. Thank you.

Mr. FRANKS. Thank you, Mr. Nadler. And I now recognize the distinguished gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I thank the witnesses for your testimony. A few questions come to mind as I listen to the testimony. And I would turn first to Professor Echeverria. And I know you had more to say, so I will give you some opportunity to do that. But I would like if you could target it on this. Looking at the Fifth Amendment—and could you tell me your understanding of why the phrase “for public use” exists in the Fifth Amendment? And under the result that I think you've advocated, wouldn't that Fifth Amendment function just as well without that phrase, for public use?

Mr. ECHEVERRIA. I think the Supreme Court has said, and has said for 100 years, long before *Berman*, that the public use phrase imposes an obligation on the government to use the eminent domain power for a reasonable, rational, public purpose. And some people object to the idea that the term “use” can mean purpose. But I always say, when my children are making a lot of noise, I tell them, you know, be quiet. And sometimes it is just no use telling them to be quiet. In other words, it serves no purpose to tell them to be quiet. It is a perfectly plausible interpretation of the term “public use” that it means public purpose.

Mr. KING. Taking that argument then that you make, what do you make of the argument that it was a given that the Federal Government—or let us say all political divisions, subdivisions and otherwise—it was a given that they would respect the private property rights that might otherwise be taken for private use? Did they contemplate, do you think, that there would be people well enough positioned with their economic development influence and dollars, that they would be advocating to government that private property should be confiscated and given to other private interests? Or do you think—obviously I believe it was outside the scope of the thinking of our Founding Fathers when they drafted the Fifth Amendment. I would ask how you respond to that.

Mr. ECHEVERRIA. The U.S. Constitution has never been interpreted to prohibit the taking of private property for economic development.

Mr. KING. I might argue that that is what happened.

Mr. ECHEVERRIA. I'm just going to say that in the 19th century, when the Supreme Court focused in on this issue and said how do we interpret this phrase, they weren't focusing on urban redevelopment projects, obviously. They weren't focusing on *Berman*-type projects. They were dealing with claims that States could allow mining companies or irrigation companies to acquire access across private lands and that allowing private people to take private property in order to promote that kind of economic development.

Another good example that goes even further back is the so-called Mills Act, under which people who were trying to build old-fashioned mills wanted to place the mills at propitious sites along the rivers, and State law allowed them to do that. And people were allowed to seize those sites because placing those very valuable, early manufacturing—

Mr. KING. Were those acts litigated, the Mills Act, for example, to the Supreme Court?

Mr. ECHEVERRIA. Oh, yes. There is a whole library—

Mr. KING. That is the component I'm not familiar with. I will take your heads-up on that, Professor, and go back and review that for my own edification. But I would take you also to the statement that you made in your testimony. Congress—I'm reading from your text. "Congress should refrain from attempting to craft national legislation that would attempt to impose a one-size-fits-all solution on States and localities. But isn't that what the Constitution of the United States actually is, is a one-size-fits-all document, and our legislation that is before us is a direct response to a decision made by the Supreme Court to alter the interpretation of the Constitution itself?

So I will just make the point that the Constitution itself is a one-size-fits-all document. It protects rights and liberties specifically, so that all Americans live under the same standard. And I would open up for that response.

Mr. ECHEVERRIA. I'm second to none in my defense of the Constitution. *Kelo* changed nothing. *Kelo* reaffirmed 100 years of U.S. Supreme Court precedent.

Mr. KING. That would be the majority opinion, but not the dissenting opinion.

Mr. ECHEVERRIA. Well, it is the view of a majority of the Supreme Court; I think the overwhelming view of the majority of scholars. I think the argument was thoughtfully laid out in the brief I filed in the U.S. Supreme Court that was embraced by a majority of the court.

Mr. KING. As my clock ticks, Professor—

Mr. ECHEVERRIA. This legislation is a radical departure from the Constitution. This legislation does not see—

Mr. KING. Thank you. I would provide my own rebuttal, but I would like to offer Ms. Berliner an opportunity to do that since we are down to the yellow light. Thank you.

Mr. ECHEVERRIA. Thank you.

Ms. BERLINER. Well, *Kelo* did change the law. Up until then, there was still some attempt to adhere to a concept of public use that was certainly dented after *Berman*. But some attempt was made. But what happened in *Kelo*, it is almost as if the court was heading in the wrong direction. It was heading like this. But *Kelo* went from here to here. And it made a huge difference. Because in that case, instead of being about an area which I will never defend—so I am clear—but the area there was certainly in very bad shape and it was causing actual public health harms. In *Kelo*, there wasn't any claim there was anything wrong with this area. They didn't even bother to claim that. They just said we can make more money off of it if it was something else.

Mr. KING. I would just say when I see a residential home sticking up in the middle of an asphalt parking lot, I see that as a monument to the Fifth Amendment. I think property rights are so valuable a foundation for the economic development that this country has had, that when they are threatened and when they are damaged, it threatens our long-term development as well. Thank you. And I would yield back.

Mr. FRANKS. Thank you, Mr. King. I would concur with your thoughts completely. I recognize now the former distinguished Chairman of the Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Franks.

Ms. Vendetti, I wanted to join those that have applauded your strategies and courage and welcome you here as well.

What do you think of what you have heard here with all these lawyers and one very successful businessman today? How does this affect your feeling about what happened to you and what we are thinking about doing here?

Ms. VENDETTI. I am from New Jersey and there is no legislation to stop eminent domain from being used again the way it was in Long Branch. In Long Branch, the municipality blighted acres and acres of oceanfront. I mean, there were hundreds and hundreds of homes there. We have to have something in place to stop that—not in New Jersey, but all throughout the country. I think this is a step in the right direction. I mean, you can keep some Federal funds from municipalities.

I know when this was first thought about, our mayor and our city council almost—you know, well, they freaked out basically. They were nervous. You can't keep taking people's homes to give to someone else to build bigger homes. It just can't happen in the United States. And when I was doing the rallying and going across New Jersey and parts of the country too, people still to this day say, That can't happen in America.

Well, it can happen in America and we have to put a stop to it. I mean, if this is a drastic change, then maybe that is what we need in America. I mean, we need to put our foot down and say—you know, my father was a truck driver. How did he have a summer home? And he worked his rear end off, excuse me, but to have that home. And for someone just to come in to say, you know, he is no longer going to have it because we want to put something else better there, we need drastic means to stop that.

Mr. CONYERS. Thank you.

Professor Echeverria, is it accurate to say that this is something that has just started? Or maybe this has been going on longer than you knew about, Ms. Vendetti, because there have been a lot of eminent domain takings along this way for a long time. And I am not sure if the proposal before us is really going to correct what maybe you think it corrects. And I would like to ask the professor to join us in this conversation.

Mr. ECHEVERRIA. Thank you Chairman Conyers. If I could just join everyone in commending Ms. Vendetti in her successful struggle; it displays an enormous amount of courage and energy. I do just want to point out that thankfully she won. She won under New Jersey law by enforcing her rights to proper application of the New Jersey statutes. So the good news is that other people in New Jersey in similar circumstances won't face the threat that she faced, because the appellate courts in New Jersey and the Supreme Court of New Jersey have clarified what the standards are.

In response to your question, eminent domain has been with us for a long time. It is with us today. One of the ironies of this legislation, I find, is that it talks a great deal about rural landowners and rural landownership. But I don't know what it does for rural landowners, with respect to eminent domain, if anything.

To my understanding, there are two big issues with respect to eminent domain that face rural landowners in the United States as we speak. One is large pipeline developments, particularly the Keystone pipeline that is coming from Canada through the Dakotas through Nebraska through Wyoming.

If you Google Keystone and landowners, you will find innumerable articles about the controversies that are going on in those States about the use of eminent domain to take property for those pipelines. That is not part of this bill, even though it purports to protect rural property owners.

The other controversy has to do with transmission lines for the transport of electricity, an enormous issue in Virginia and other States. Landowners have been embroiled in very contentious controversies over the siting of those facilities, and the use of eminent domain for that purpose. Again, not within the scope of this bill.

If there is another eminent domain controversy where the use of eminent domain is being used in a way that threatens rural landownership that is within the scope of this—

Mr. CONYERS. Chairman Franks, might I get an additional minute?

Mr. FRANKS. Absolutely.

Mr. CONYERS. Please continue.

Mr. ECHEVERRIA. I was essentially done. I just said that the threats that rural landowners face as a result of eminent domain are types of eminent domain that are not addressed at all in this bill. And if there are other threats that are within the scope of this bill that do face rural landowners, I don't know what they are.

Mr. CONYERS. Well, the reason I needed a minute more is that I wanted to ask you about the problem of minorities being removed through abusive condemnation actions. There is so much urban renewal that has gone on historically that it is called "black removal."

And I am wondering what the effects of the Supreme Court decision and this bill have on that general consideration because, after all, Mr. Chairman, the real problem for many of us is that this will not guarantee—this will not help that removal of poor people who can't go into court, can't go through long battles, legal battles to win, as our distinguished witness did. Could you comment on that, please?

Mr. ECHEVERRIA. Well, I think that the larger issue is that taking away the eminent domain power would be a threat to urban America. The reality is that in urban areas, landownership is very fragmented. It is very hard to get housing built, to get commercial redevelopment done, without using the eminent domain power.

An example that I am very familiar with is the Skyland Mall in Anacostia, across the river from here. If you walk around that neighborhood and you quiz people, as I have done, and ask, "Would you support the use of eminent domain so that we can rehabilitate this shopping center?" The people you will meet on the street, who, as you know, are by a vast majority African Americans, will say, Yes, indeed, we want this shopping center rehabilitated. And we want that done.

It has not been done because there has been endless litigation in the D.C. courts trying to challenge the use of eminent domain to get that accomplished. So that is an example where I think African Americans seeking redevelopment of their communities, in fact, support the use of eminent domain.

Mr. NADLER. Mr. Chairman could I ask unanimous consent to ask one question?

Mr. FRANKS. Yes. Without objection.

Mr. NADLER. Thank you. Professor, we are aware obviously of the problem that the distinguished former Chairman was talking about. It certainly occurred in New York years ago. My impression—and I want to ask if this is the correct impression—is that really since the seventies, since large-scale construction of public housing and subsidies were replaced by section 8 and other things, that that really hasn't happened in the last 30 or 40 years; am I correct or not?

Mr. ECHEVERRIA. That's my general impression, that you have to go back to the days of Robert Moses if you want to see real eminent domain abuse. And that, in a sense, we are in a much better environment. And the worst abuses I think as you indicated, were associated with highway construction.

Mr. NADLER. But could it happen again? Under the current state of the law—I haven't seen it happen for a long time. I mean I certainly know of instances in New York history where it did 40 or 50 years ago, and it was called Negro removal and so forth. But could the city of New York or the city of Chicago or wherever condemn an entire neighborhood in order to put up an—I don't know, a new Lincoln Center or something today?

Mr. ECHEVERRIA. Well, I think there are a couple of answers to that. I think as a matter of constitutional law, to contradict Ms. Berliner, *Kelo* actually places some additional constraints relative to *Berman* and clearly to the *Midkiff* precedent which was, ironically enough, written by Justice O'Connor, which was sort of the high watermark of the use of eminent domain. The Supreme Court

in *Kelo* emphasized the need for an inclusive public planning process where the people have an opportunity to comment, in which there was democratic participation, in which the public authorities lay out what they intend to do in the form of a comprehensive plan, and there is a full back-and-forth. So I think that offers some protection.

But I think the more important answer to your question is really a change in social attitudes, that we value communities more than we used to, we respect the rights of minorities more than we used to. And I just think it is hard to imagine in this day and age those kinds of abuses occurring again.

Mr. FRANKS. Let me if I could go ahead, since we extended the questioning here a little bit, and ask Ms. Berliner to comment on Mr. Nadler's question related to the notion that there is a potential of black removal. I am trying to use that—

Ms. BERLINER. I mean, that is still perfectly possible under the law as it stands now, under the Supreme Court law. And this bill would actually do something to stop it. That is something that continues to happen. Again, there is a peer-reviewed article that came out recently showing that even within cities, the areas designated for eminent domain are the ones that are more minority areas than the rest of the city. And in fact, this bill does provide an avenue other than bringing a lawsuit, which I agree most people can't do, which is you can call the AG. You can call the Attorney General, tell them what is happening, and the Attorney General can figure out if something has happened.

So there is an avenue built into this bill that doesn't require years of litigation by individuals who can't afford it. And that is one of the things about the bill that is extremely helpful.

Mr. FRANKS. I want to thank the witnesses for coming today. And I especially wanted to suggest that Professor Echeverria, you mentioned that some of the neighbors there, some of the African American neighbors there, wanted the mall refurbished; and that if it hadn't been for so many of them fighting it in court, which occurs to me that maybe some of them are hesitant to let go of their rights—

Mr. ECHEVERRIA. It is not them fighting in court.

Mr. FRANKS. But in any case, let the record also reflect that someone had told me that when I called on the former Chairman, I called him the distinguished former Chairman. Somebody said I got those words a little bit wrong. I did not mean to suggest that he was formerly distinguished. Not at all. And in fact I think he distinguished himself very well today.

So, again, I would like to thank all the witnesses for their testimony today. And without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond to us as promptly as possible so that their answers can be made a part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

And with that, again, I thank the witnesses and the Members. And this hearing is adjourned.

[Whereupon, at 5:19 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

**Statement by Rep. Jerrold Nadler
Hearing on the Private Property Rights Protection Act
April 11, 2011**

Thank you, Mr. Chairman.

For once the Supreme Court defers to the elected officials, and Congress cries foul.

The power of eminent domain is an extraordinary one, and should be used with great care. All too often, it has been abused for private gain, or to benefit one community at the expense of another.

It is, however, an important tool making possible transportation networks, irrigation projects, and other public purposes. To some extent, all of these projects are “economic development projects.” Members of Congress are always trying to get these projects for our districts, and certainly the economic benefit to our constituents is always a consideration.

Has this bill drawn the appropriate line between permissible and impermissible uses of eminent domain? I think that is one of the questions we will really need to consider. We all know these easy cases. As the majority in *Kelo* said, “[T]he City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.” But which projects are appropriate and which are not can sometimes be a difficult call.

Historically, eminent domain has been used to destroy communities for projects having nothing to do with economic development, at least as defined in this bill. For example, highways have cut through neighborhoods, destroying them. Some of these communities are in my district, and have yet to recover from the wrecker’s ball. Yet that would still be permitted by this bill. Other projects might have a genuine public purpose, and yet be prohibited. The rhyme or reason of this bill is not clear.

I believe, as I did in 2005, that this bill is the wrong approach to a very serious issue.

It will permit many of the abuses and injustices of the past, while crippling the ability of state and local governments to perform genuine public duties.

The bill would allow takings for private rights of way: pipelines, transmission lines, railroads.

It would allow highways to cut through communities and all the other public projects that have historically fallen most heavily on the poor and powerless. As Hilary Shelton of the NAACP testified when we last considered this legislation, these projects are just as burdensome as projects that include private development.

It allows a taking to give property to a private party “such as a common carrier, that makes the property available for use by the general public as of right”

Does that mean a stadium? It is privately owned, “available for use by the general public as of right” at least as much as a railroad: you can buy a seat. Is it a shopping center? You don’t even need a ticket.

The World Trade Center could not have been built under this law. It was publically owned, but was predominantly leased office space and retail. Neither could Lincoln Center.

Affordable housing, like the Hope VI or the fabled Nehemiah program, a faith-based affordable housing program in Brooklyn, could never have gone forward.

Since 2005, there have been new developments that call into question whether Congress should even act at this point. In response to the Kelo decision, states have moved aggressively to reconsider and amend their own eminent domain laws. More than 40 states have acted. States have considered carefully the implications of this decision, and the needs of their citizens. I question whether Congress should now come charging in and presume to sit as a national zoning board, deciding which projects are or are not appropriate.

The law suits permitted, and the uncertainty of the bill’s definitions, would cast a cloud over legitimate projects. A property owner or tenant has seven years *after* the condemnation before the litigation and appeals even begin.

Did the trial lawyers write this?

The local government would risk all of its economic development funding for two years, even for unrelated projects, and face bankruptcy if it guesses wrong about a project.

If you want to give someone the power to extort an entire city, this is it.

Mr. Chairman, this legislation goes well beyond the hypothetical taking of a Motel 6 to build a Ritz Carlton. It threatens communities with bankruptcy without necessarily protecting the most vulnerable populations. It comes after years of state action in which states have decided which approach would satisfy their concerns, and protect their citizens, the best.

I look forward to the testimony of today’s witnesses who I hope can help us work through these difficult questions, and I yield back the balance of my time.



**Statement of Congressman John Conyers, Jr.
Hearing on H.R. 1433, Private Property Rights Protection Act
April 12, 2011**

Today the Subcommittee returns its attention to the issue of private property rights and eminent domain . When this legislation was introduced in 2005, I was an original cosponsor due to my concerns about how the practice of condemnation for economic development purposes have impacted minority communities. However, with the passage of time and legislative actions by the states to limit the practice, I have concerns about the necessity for federal action. I believe that this hearing will be important to updating the current state of affairs around the issue. Looking forward, I hope to work with my colleagues on both sides of the aisle to achieve a proper response to the Kelo decision.

In June 2005, the Supreme Court reached a decision in Kelo v. City of New London (545 U.S. __ (2005) that shocked and outraged some Americans. If state and local governments can transfer property from one private owner to another based on their judgment of which uses will produce the most taxes and jobs, *it is not unreasonable to believe that no one's property is safe.*

As we explore this issue, I raise three primary concerns: (1) First, I would like to discuss the impact eminent domain and the Kelo decision have had on our minority, elderly, and poor communities. (2) Second, we should focus on how we

might define “*public use*” so that we protect property interests, as well as meet contemporary challenges. (3) Third, recognizing the complexity of this issue, I caution us to be thoughtful and prudent as we proceed in discussing potential remedies, given the particularly severe impact that any loss of economic development funds could have on poor and minority communities.

More than two dozen individuals and organizations filed briefs with the U.S. Supreme Court in support of the homeowners in Kelo v. City of New London. These “friends of the court,” including the NAACP and the Southern Christian Leadership Conference, urged the justices to use the case of Kelo to end eminent domain abuse.

As the NAACP articulated in its brief, eminent domain has historically been used to target the poor, the elderly, and people of color. In this current era of gentrification and urban renewal efforts, these populations continue to suffer disproportionately. Even well cared for properties owned by minority and elderly residents risk being replaced with superstores, casinos, hotels, and office parks.

The financial gain that comes with replacing low property tax value areas with high property tax value commercial districts is too attractive for many state and local governments to resist. Such condemnations in predominantly minority and elderly neighborhoods are often easier to accomplish than they are elsewhere

because such communities often lack the political and economic clout necessary to contest these development plans.

Absent a more narrowly defined public use requirement, the takings power will continue to be abused and our most vulnerable citizens – racial and ethnic minorities, the elderly, and the economically disadvantaged – will disproportionately be affected and harmed. As we work to better define “public use,” we must also consider what “economic development” should mean in this context.

Increasingly, governments across this country are taking private property for public use in the name of “economic development.” Under the guise of economic development, private property is being taken and transferred to *another private owner*, so long as the new owner will use the property in a way that the government deems more beneficial to the public.

In my district of Detroit, Michigan, we have faced the same kinds of issues that arose in this case: the taking, through eminent domain, of private property for the so-called higher economic purpose of casino development. Perhaps, Justice O’Connor articulated it best when she wrote in her dissent: “Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”

Many of us share Justice O'Connor's sentiment and feel like Kelo may run the risk of trampling the Constitutional guarantees provided by the Takings Clause of the Fifth Amendment – that “private property shall not be taken for *public use*, without *just compensation*.” However, we must also be thoughtful and prudent as we take on this issue by obtaining a better sense of how states and cities will address Kelo.

It is important to point out that the Majority admitted that state courts are free to interpret their own provisions in a manner that's more protective of property rights. Thankfully, every state Constitution has prohibitions against private takings and a requirement that takings be for public use. To date, I believe that 43 states have taken some steps to address the issue of eminent domain abuse. So, there is an ample record for us to examine as we consider the need for federal action.

I look forward to exploring the issues I have just identified at today's hearing. Thank you.





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April 12, 2011

To: All Members, House Subcommittee on the Constitution
Re: "Private Property Rights Protection Act"

Dear Representative:

On behalf of the Property Rights Alliance (PRA), I am writing today to urge you support the "Private Property Rights Protection Act of 2011" co-sponsored by Rep. James Sensenbrenner (R-WI) and Rep. Maxine Waters (D-CA). Eminent domain abuse continues to be a serious concern for private property owners across the United States and warrants your help once again.

As a result of the Supreme Court's 2005 ruling in *Kelo v. City of New London*, the government's power of eminent domain has become almost limitless, providing victimized citizens with few means to protect their property. This legislation will suspend Federal economic development funds for a period of two fiscal years to any state that takes property through eminent domain for a private purpose. It will also allow private property owners legal recourse to fight private property takings by state and local governments that are used for private purposes.

Several states have independently passed legislation to limit their power to eminent domain, and the Supreme Courts of Illinois, Michigan, and Ohio have barred the practice under their state constitutions. This bill will provide American citizens in every state with the means to protect their private property from exceedingly unsubstantiated claims of eminent domain.

Your strong leadership and efforts to correct the abusive use of eminent domain is needed at a time when government continues to leave the door wide open to these egregious takings. Although many states have already acted, Congress must play a pivotal role in reforming the use and abuse of eminent domain. On behalf of the property rights community, we thank you for your leadership on this issue and look forward to your continued efforts to protect private property.

Sincerely,

Kelsey Zahourek
 Executive Director